



UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

Faculty Library



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

June Term, 1858, and January Term, 1859.

BY JOHN W. SHEPHERD,

STATE REPORTER.

40593
VOL. XXXIII.

MONTGOMERY:

BARRETT & WIMBISH, BOOK AND JOB PRINTERS AND BINDERS.

1859.

✓
KFA
45
.A2
v.33
Copy 2

✓
F.L.
S
A1270
A111

OFFICERS OF THE SUPREME COURT,

DURING THE TERM OF THESE DECISIONS.

BEFORE THE 25TH JANUARY, 1859.

HON. SAMUEL F. RICE,* Chief Justice.

HON. A. J. WALKER, } Associate Justices.
HON. GEO. W. STONE, }

AFTER THE 25TH JANUARY, 1859.

HON. A. J. WALKER, Chief Justice.

HON. GEO. W. STONE, } Associate Justices.
HON. RICH'D W. WALKER,† }

M. A. BALDWIN, Attorney-General.

JOHN D. PHELAN, Clerk.

JAMES S. ALBRIGHT, Marshal.

*Resigned January 25, 1859.

†Appointed by the Governor to fill the vacancy occasioned by the resignation of RICE, C. J.

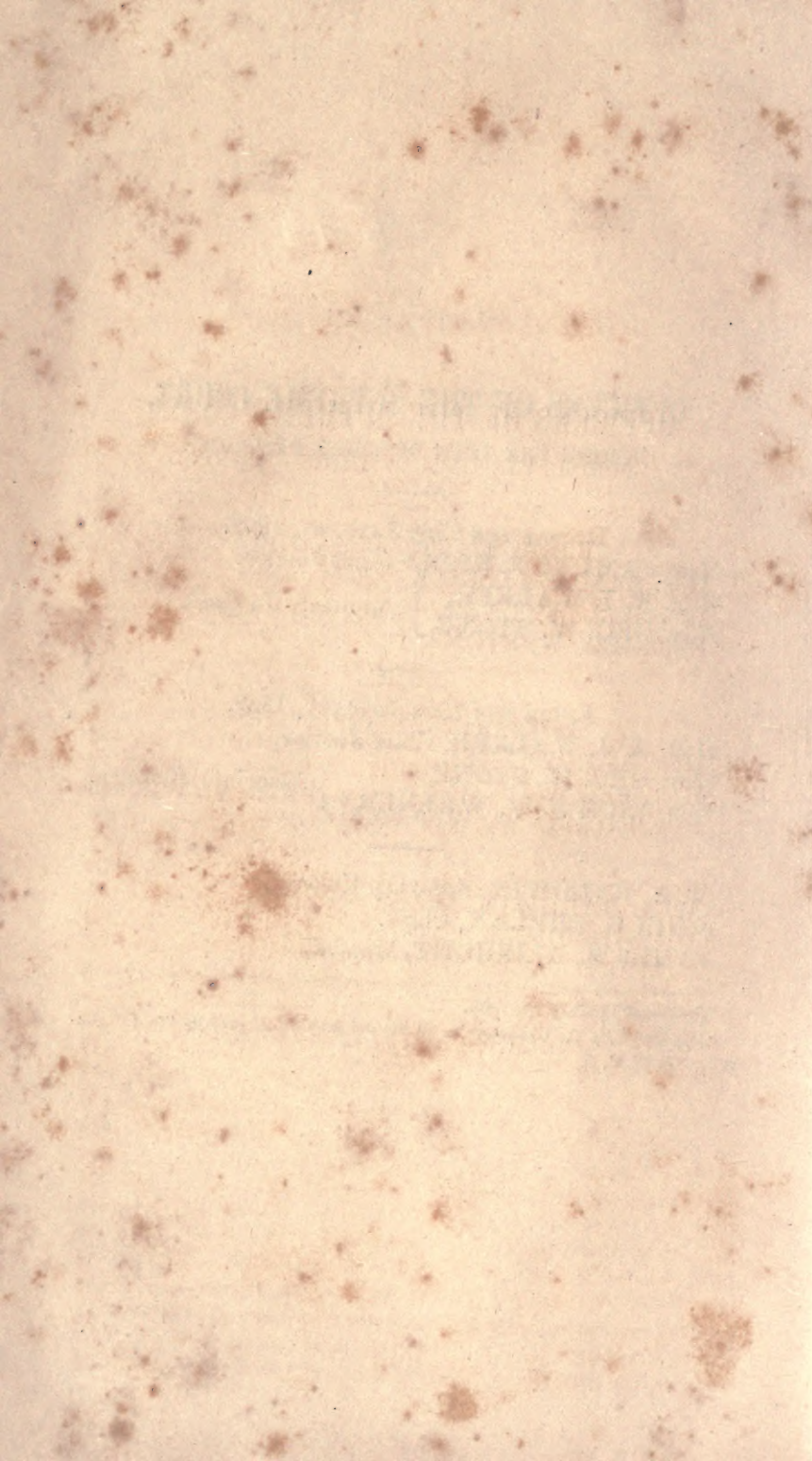


TABLE OF CASES.

Abernathy ats. Whitman.....	154	Childress and Wife v. Mann & Co	206
Acker v. Bender.....	230	Childress and Wife v. Taylor..	185
Allen ats. The State.....	422	City Council of Montgomery v. Gilmer & Taylor.....	116
Allen & Reynolds ats. Conner & Johnson.....	515	Clanton ats. McKenzie.....	528
Anderson ats. Parmer.....	78	Clarke County ats. James.....	51
Armour v. Lose.....	317	Clifton ats. Hatcher's Adm'rs..	301
Arnett's Executor v. Arnett...	273	Cockerell ats. Brown.....	38
Bank of Mobile v. Meagher & Co.....	622	Cockrell ats. McGraw.....	526
Bank of Mobile ats. Pearce...	693	Collins v. Doe d. Robinson...	91
Bank (Br.) of Montgomery ats. Green.....	643	Collins v. The State.....	434
Bartee and Wife v. James....	34	Conner & Johnson v. Allen & Reynolds	515
Bates' Adm'r v. Bates.....	102	Cook ats. Elliott.....	490
Bender ats. Acker.....	230	Cook & Johnson ats. McNeill's Adm'r	278
Bibb ats. Scruggs.....	481	Cooper's Adm'r v. Tillman's Adm'rs	332
Bibb & Garrett v. Terry.....	514	Cothran v. McCoy's Heirs....	65
Black v. Stone & Co.....	327	Cotten ats. Holloway.....	529
Blackwell's Adm'r v. Blackwell's Distributees.....	57	Cotten v. Rutledge.....	110
Blakeney ats. Patterson.....	338	Couch v. McKellar.....	473
Blakey's Heirs v. Blakey's Ex'x,	611	Courson v. Herrin's Adm'r...	553
Bone and Wife ats. McCartney's Executors.....	601	Cox, Brainard & Co. v. Foscue.	713
Boyd ats. Rogers	175	Crandall ats. Firemen's Ins. Co.	9
Brown v. Cockerell.....	38	Crossman v. Crossman.....	486
Burdine v. Mustin.....	634	Curtis v. Williams.....	570
Burns v. Hamilton's Adm'r....	210	Daly v. The State.....	431
Bush ats. Henley.....	636	Danforth v. Herbert.....	497
Byrd v. McDaniel.....	18	Davidson v. The State.....	350
Campbell ats. Wilson.....	249	Deens v. Dunklin.....	47
Cantaline v. The State.....	439	Deramus ats. Harrison.....	463
Carleton ats. Savage's Adm'r..	443	Doe d. Robinson ats. Collins..	91
Carroll ats. Malone.....	191	Donald & Co. v. Hewitt.....	534
Carter v. The State.....	429	Drake v. Flewellen & Co.....	106

Dunklin ats. Deens.....	47	Herrin's Adm'r ats. Courson..	553
Dupree v. The State.....	380	Hewitt ats. Donald & Co.....	534
Elliott v. Cook.....	490	High v. Worley.....	196
Elliott v. Holbrook, Carter & Co.	659	Holbrook, Carter & Co. ats.	
Evans v. Kittrell.....	449	Elliott.....	659
<i>Ex parte</i> McLendon.....	276	Holloway v. Cotten.....	529
<i>Ex parte</i> Peterson.....	74	Houston v. Stubbs.....	555
Farmer v. Wilson.....	446	Insurance Co. (Firemen's) v.	
Fawcetts v. Kimmey.....	261	Crandall.....	9
Firemen's Ins. Co. v. Crandall..	9	James ats. Bartee and Wife...	34
Fitts ats. Little.....	343	James v. Clarke County.....	51
Flewellen & Co. ats. Drake....	106	Jeans v. Lawler.....	340
Floyd v. Hamilton.....	235	Jemison ats. King.....	499
Foscue ats. Cox, Brainard & Co.	713	Jemison ats. Tuskaloosa Bridge	
Gaffard ats. Smith.....	168	Co.....	476
Galloway's Adm'r ats. West....	306	Jenkins' Executor v. Jenkins..	731
Garey v. Meagher & Co.....	630	Johnson's Adm'r v. Johnson..	284
Garrett ats. Saunders' Adm'r..	454	Johnson's Adm'r v. Sellers'	
Garrett & Bibb v. Terry.....	514	Adm'r.....	265
Gilmer & Taylor ats. City Coun-		Johnson & Conner v. Allen &	
cil of Montgomery.....	116	Reynolds.....	515
Gliddon ats. McCullough and		Johnson & Cook ats. McNeill's	
Wife.....	208	Adm'r.....	278
Glover ats. Grayson.....	182	Jones' Adm'r ats. Harrison's	
Gordon ats. Saltonstall and		Adm'r.....	258
Wife.....	149	Kilgore ats. Taylor and Wife..	214
Grayson ats. Glover.....	182	Kimmey ats. Fawcetts.....	261
Green v. Branch Bank at Mont-		King v. Jemison.....	499
gomery.....	643	Kittrell ats. Evans.....	449
Griffin ats. Rose.....	717	Lawler ats. Jeans.....	340
Gunn v. Samuel's Adm'r.....	201	Lawrence ats. Sprowl.....	674
Hamilton ats. Floyd.....	235	Lesueur and Wife ats. Moore..	237
Hamilton ats. Hassell.....	280	Lewis' Adm'r v. Lindsay's	
Hamilton's Adm'r ats. Burns..	216	Adm'r.....	304
Hamner ats. Patton.....	307	Lewis' Executor ats. Morris...	53
Hardy v. Meachem's Adm'r...	457	Lindsay's Adm'r ats. Lewis'	
Harris v. The State.....	373	Adm'r.....	304
Harrison v. Deramus.....	463	Little v. Fitts.....	343
Harrison ats. Smith.....	706	Lose ats. Armour.....	317
Harrison's Adm'r v. Jones'		Malone v. Carroll.....	191
Adm'r.....	258	Mann & Co. ats. Childress and	
Hart ats. Smoot.....	69	Wife.....	206
Hassell v. Hamilton.....	280	Matthews v. Robinson.....	320
Hatcher's Adm'r v. Clifton....	301	May v. Hewitt, Norton & Co...	161
Hawkins v. The State.....	433	May v. May's Heirs.....	203
Henderson v. Simmons.....	291	McCartney's Executors v. Bone	
Henley v. Bush.....	636	and Wife.....	601
Henry (a slave) v. The State...	389	McCollum v. McCollum's Exe-	
Herbert ats. Danforth.....	497	cutor.....	711

TABLE OF CASES.

vii

McCoy's Heirs ats. Oothran... 65	Rosenbaum v. The State.....354
McCullough and Wife v. Glidon.....208	Ross ats. Williamson's Adm'r...509
McDaniel ats. Byrd.....18	Russell v. The State.....360
McGraw ats. Cockrell.....526	Rutledge ats. Cotten.....110
McKellar ats. Couch.....473	Saltonstall and Wife v. Gordon,149
McKenzie v. Clanton.....528	Samuel's Adm'r ats. Gunn.....201
McLendon, <i>Ex parte</i>276	Saunders' Adm'r v. Garrett....454
McNeill's Adm'r v. Cook & Johnson.....278	Savage's Adm'r v. Carleton....443
Meachem's Adm'r ats. Hardy...457	Scott ats. Wyatt's Adm'r.....313
Meagher & Co. ats. Bank of Mobile.....622	Scruggs v. Bibb.....481
Meagher & Co. ats. Garey.....630	Sears v. The State.....347
Mims v. Mims.....98	Sellers' Adm'r ats. Johnson's Adm'r.....265
Molett v. The State.....408	Sessions' Adm'r v. Sessions...522
Mooney v. The State.....419	Sevier v. Throckmorton.....512
Moore v. Lesueur and Wife...237	Sheppard ats. Shorter.....648
Morgan v. The State.....413	Sherard v. Sherard's Adm'r...488
Morris v. Lewis' Executor....53	Shields & Smith ats. Troy....469
Mustin ats. Burdine.....634	Shorter v. Sheppard.....648
Myers' Executors v. Myers....85	Simmons ats. Henderson.....291
Napier ats. Weeks.....568	Simmons ats. Wynn.....272
Nesbitt v. Pearson's Adm'rs...668	Smith v. Gaffard.....168
O'Grady ats. Rabby & Co.....255	Smith v. Harrison.....706
Otis ats. Rhodes.....578	Smith & Shields ats. Troy....469
Oxford v. The State.....416	Smoot v. Hart.....69
Parker's Heirs v. Parker's Adm'r.....459	Sprowl v. Lawrence.....674
Parmer v. Anderson.....78	Stallings v. The State.....425
Patterson v. Blakeney.....338	State v. Allen.....422
Patton v. Hamner.....307	State ats. Cantaline.....439
Pearce v. Bank of Mobile....693	State ats. Carter.....429
Pearson's Adm'rs ats. Nesbitt .668	State ats. Collins.....434
Peebles v. Tomlinson.....336	State ats. Daly.....431
Peterson, <i>Ex parte</i>74	State ats. Davidson.....350
Pool's Heirs v. Pool's Executor.....145	State ats. Dupree.....380
Rabby & Co. v. O'Grady.....255	State ats. Harris.....373
Rawles ats. Thompson.....29	State ats. Hawkins.....433
Redman v. The State.....428	State ats. Henry (a slave)....389
Reynolds & Allen ats. Conner & Johnson.....515	State ats. Molett.....408
Rhodes v. Otis.....578	State ats. Mooney.....419
Robinson ats. Collins.....91	State ats. Morgan.....413
Robinson ats. Matthews.....320	State ats. Oxford.....416
Rogers v. Boyd.....175	State ats. Redman.....428
Rogers ats. Vincent.....224	State ats. Rosenbaum.....354
Rose v. Griffin.....717	State ats. Russell.....366
	State ats. Sears.....347
	State ats. Stallings.....425
	Sterns ats. Thomas.....137
	Stewart v. Stokes.....494
	Stewart v. Williams.....492

Stokes ats. Stewart.....	494	Tuskaloosa & N. P. Man. Co.	
Stone & Co. ats. Black.....	327	ats. Watkins.....	518
Stubbs v. Houston.....	555	Vincent v. Rogers.....	224
Sughi ats. Thorpe.....	330	Watkins v. Tuskaloosa & N. P.	
Taylor ats. Childress and Wife,	185	Man. Co.....	518
Taylor and Wife v. Kilgore...	214	Weeks v. Napier.....	568
Terry ats. Garrett & Bibb....	514	West v. Galloway's Adm'r....	306
Thomas v. Sterns.....	137	Whitman v. Abernathy.....	514
Thompson v. Rawles.....	29	Williams ats. Curtis.....	570
Thorpe v. Sughi.....	330	Williams ats. Stewart.....	492
Throckmorton ats. Sevier....	512	Williamson's Adm'r v. Ross..	509
Tillman's Adm'r's ats. Cooper's		Wilson v. Campbell.....	249
Adm'r.....	332	Wilson ats. Farmer.....	446
Tomlinson ats. Peebles.....	336	Worley ats. High.....	196
Troy v. Smith & Shields.....	469	Wray v. Wray.....	187
Tuskaloosa Bridge Co. v. Jemi-		Wyatt's Adm'r v. Scott.....	313
son.....	476	Wynn v. Simmons.....	272

REPORTS

OF

CASES ARGUED AND DETERMINED

At June Term, 1858.

FIREMEN'S INSURANCE CO. *vs.* CRANDALL.

[ACTION ON POLICY OF INSURANCE AGAINST FIRE.]

1. *Waiver of preliminary proof of loss.*—If the insurers, in case of a loss covered by the policy, intend to contest their liability on account of defects in the preliminary proof, it is their duty to put their refusal to pay on that ground, or to inform the assured that they consider such proof defective ; and if they fail to do so, their silence is an implied waiver of such defects. (STONE, J., *dissenting*, held that, under the proof in this case, the court was not authorized to assume, as matter of law, that the answer of the insurers was a refusal to pay in any event.)

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Lyman S. Crandall, against the appellant, to recover the value of certain drugs, medicines, &c., which were destroyed by fire while covered by a policy of insurance effected with the appellant.

Among the conditions annexed to the policy was the following: "Persons sustaining loss or damage by fire, shall forthwith give notice thereof, in writing, to the company, and, as soon after as possible, shall deliver an

account of their loss and damage, at the cash value, with all the particulars as fully detailed as the nature of the case will admit, signed with their own hands; and they shall accompany the same with their oath, or affirmation, declaring the said account to be true and just; showing, also, whether any and what other insurances have been made on the same property, what was the whole value of the subject insured, in what general manner (as to trade, manufactory, merchandise or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe. They shall also produce a certificate, under the hand and seal of a magistrate or notary-public, most contiguous to the place of the fire, and not concerned in the loss, stating that he has examined the circumstances attending the fire, loss or damage alleged; and that he is acquainted with the character and circumstances of the insured or claimant; and that he verily believes that he, she or they have, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured, to the amount which the magistrate or notary-public shall certify; and, whenever required in writing, the insured, or person claiming, shall produce and exhibit his books of account, and other vouchers, to the insurers or their agents, in support of his claim, and permit extracts and copies thereof to be made, and also exhibit to any person named by the company, and permit to be examined by them, any property damaged on which loss shall be claimed; and until such proofs, declarations and certificates, exhibitions and examinations of such damaged property, are produced and permitted by the claimant, when required as above, the loss shall not be payable. All fraud or false swearing shall cause a forfeiture of all claim on the insurers, and shall be a bar to all remedies against them on the policy."

The material facts disclosed on the trial, as shown by the bill of exceptions, are these: The fire occurred on the night of the 3d April, 1855. A few days afterwards, the

plaintiff's attorney called on the secretary of the insurance company, informed him of the plaintiff's loss, and inquired whether the company would require a compliance with all the conditions of the policy; to which inquiry the secretary answered, as he testified on the trial, "Yes, to the very letter." The plaintiff, "some days or more after the fire," applied to Wm. Brooks, an acting justice of the peace in the city of Mobile, to make an examination of the circumstances attending the fire, and to give him a certificate as required by the conditions annexed to the policy; but Brooks, after making the examination, declined to give such certificate. The plaintiff's attorney afterwards submitted to the secretary of the insurance company the plaintiff's own affidavit of his loss, his books of account, and a receipt of one A. J. Bates, of New York, acknowledging the payment by the plaintiff of \$3,000 for drugs and medicines bought of said Bates. On or about the 4th June, 1855, the plaintiff's attorney called on the president of the insurance company, "and asked him whether they would pay Crandall's claim; to which the president answered, 'No, we will not pay it.'"

"To show a compliance with the preliminary proof before the company, the plaintiff read to the jury the said affidavit made by himself, and offered to read to the jury the said receipt of A. J. Bates. The defendant's counsel objected to said paper as evidence for any other purpose than as preliminary proof, and because it was an *ex-parte* statement before the notary-public, not taken or verified in any way as the law requires; but the defendant's objection was overruled by the court, and said paper was read to the jury as independent evidence, as a receipt only for so much money; to which the defendant excepted."

The plaintiff then tendered to the president of the insurance company, in open court, the certificate of Sidney T. Douglass, a notary-public in the city of Mobile, bearing date in November, 1856; and, on the refusal of said president to receive it, "offered the same in evidence as a part of the preliminary proof." The defendant objected to this certificate, "because it had never been offered before the time of the trial, and because it was not a com-

pliance with the law and the requirements of the policy ;” but the objections were overruled, and the certificate was allowed to go to the jury ; to which also the defendant excepted.

The court charged the jury, in writing, as follows :

“The plaintiff claims the amount of damage which, as he alleges, he has sustained by reason of a fire which occurred in his store on or about the 4th April, 1855, damaging or destroying the goods and fixtures therein, which were insured by the defendant. The insurance is not denied, nor is the fire denied ; but it is insisted, 1st, that the provisions of the 9th condition in the schedule attached to the policy have not been complied with ; 2d, that there was fraud or false swearing by the plaintiff ; 3d, that the fire was the willful act of the plaintiff ; and, 4th, that if there is any claim on the insurers, it is but nominal—of no amount. You will see by reference to the 9th clause of the policy, which is before you, what are the conditions. It is objected, that these conditions have not been complied with, in this : that the plaintiff failed to furnish to the defendants the certificate of the magistrate or notary. The plaintiff has furnished this at the trial ; and he insists, that the conduct of the defendants was a waiver of the necessity to produce it before—that the declaration made by the president dispensed with it. The law in reference to this is, if the defendants meant to insist on the defects in the preliminary proofs, they should have apprised the plaintiff that they considered them defective in that particular, or put their refusal to pay on that ground ; and if they failed to do so, their silence should be held as a waiver of such defects, so that the same shall be considered as having been fully made. If you believe that there was no waiver, and that the certificate was not furnished within a reasonable time, the defendants are entitled to a verdict.” (The residue of the charge relates to the questions of fraud and false swearing, which have no connection with the points here presented and decided.)

The defendant excepted to this charge, “in so far as it relates to the question of waiver,” and then requested the

court to instruct the jury as follows: "That if they believed from the evidence that the plaintiff's attorney, a day or two after the fire, called at the office of the company, and inquired of the secretary whether the company would require a compliance with all the conditions of his policy, and was answered by the secretary that they would require it to the letter; and that the plaintiff afterwards furnished to the company his own affidavit of the loss, and his book of accounts of goods sold by him, but no certificate of a notary-public, magistrate, or justice of the peace; and that afterwards, to-wit, about the 4th June, the plaintiff's attorney called on the president of the company, and asked him whether the company would pay the plaintiff's claim; and that the president answered, 'No, we will not pay it,'—such answer of the president, in connection with the facts named, does not amount to a waiver of the certificate of the magistrate or notary." The court refused to give this charge, and the defendant excepted.

The charge given by the court, the refusal of the charge asked, and the rulings on the evidence, are the matters now assigned as error.

WILLIAM BOYLES, with whom were CHANDLER & HERN-
DON, for the appellant, made these points:

1. The rulings of the court on the doctrine of waiver were erroneous. The foundation of the doctrine of waiver is, that the silence of the insurers, or their failure to raise an objection on account of defects in the preliminary proof, tends to mislead the assured, and lulls him into a false security; and no case has been found, in which the doctrine was applied after notice that full proof would be required. Here, the plaintiff's attorney was distinctly informed that the company would require a full compliance with the conditions, and, consequently, could not have been misled by the president's subsequent refusal to pay, after the plaintiff had made an ineffectual attempt to comply with those conditions.—*Charleston Ins. Co. v. R*——, 2 *McMullan*, 237; *Welcome v. Mutual Ins. Co.*, 2 *Gray*, 480; *Schenck v. Mer. Mutual Fire Ins. Co.*

4 Zab. 447; McMaster v. Western Mutual Insurance Co., 25 Wendell, 382; St. Louis Ins. Co. v. Kyle, 11 Mo. 287; Columbian Ins. Co. v. Lawrence, 2 Peters; 1 Green's R. 11; 9 Howard, 390. The fact that the plaintiff made an ineffectual attempt to obtain the certificate of the nearest magistrate, conclusively shows that he could not have been misled or injured by the answer of the president. Edwards v. Baltimore Fire Ins. Co., 3 Gill, 186; Norman v. Hartford Fire Ins. Co., 21 Mo. 81. The question of waiver, in cases to which the doctrine is applicable, is one of fact and intention, and is for the determination of the jury under all the circumstances; and the court was not authorized to declare, as matter of law, that the president's reply was a waiver of the certificate.—Phillips v. Protection Ins. Co., 14 Mo. 234; Kyle v. St. Louis Ins. Co., 11 Mo. 291; 21 Mo. 89; 1 Har. (Pa.) 247; 3 Gill, 176; Angell on Insurance, 260, § 233; 6 Harr. & John. 408; 9 Howard, 390. A waiver could not have been implied from any act or declaration of the president, without affirmative proof on the part of the plaintiff that the president had power to dispense with the preliminary proof.—7 Cowen, 464; 2 Johns. 114.

2. The receipt of Bates, if competent evidence for any purpose against the defendant's objection, was certainly not admissible "as independent evidence."—3 Binney, 326; 7 Durn. & E. 158; 9 Penn. St. (Barr's) R. 395; 9 Barb. 191; 3 Har. & John. 71; 1 Wash. C. C. 149; 2 Phil. Ins. § 2090.

3. The certificate of Douglass was obnoxious to the objections urged against it, and ought not to have been allowed to go before the jury.—13 Maine, 265; 7 Cowen, 462; 2 Peters, 25; 10 Peters, 513; 3 Term R. 347.

F. S. BLOUNT, and A. J. REQUIER, *contra*.—1. The receipt of Bates was admitted by the court only as a receipt for so much money. It was attested by a notarial seal, of which the court was bound to take judicial notice. 1 Greenl. Ev. § 5; Wright v. Barnard, 2 Esp. 700; 5 Cranch, 335; 3 Wendell, 173; Kirksey v. Bates, 7 Por. 532; 1 J. J. Mar. 447.

2. The certificate of Douglass was competent evidence to show that, if the insurers had not by implication waived such certificate, the plaintiff might have produced it at any time. Its admission was, at most, error without injury, because the insurers had waived the production of any preliminary proof.—20 Ala. 112.

3. The charge of the court on the doctrine of waiver was unquestionably correct. No principle of the law of insurance is better settled.—25 Wendell, 379; 9 Howard, 403; 9 Wendell, 165; 6 Cowen, 404; 6 Har. & John. 412; 2 Wendell, 64; Angell on Insurance, §§ 244–48.

4. The authorities cited to the last preceding paragraph show the error of the charge asked and refused.

RICE, C. J.—The charge given by the court was excepted to, only “in so far as it related to the question of waiver;” and so far as it relates to that question, it is fully sustained by the authorities. In fire, as well as in marine insurance, formal defects in preliminary proof may be supplied, whenever objection to pay a loss is put upon that ground. If the underwriters mean to insist upon such a defect, “they should apprise the assured that they consider the preliminary proofs defective in that particular, or put their refusal to pay upon that ground as well as others, *so as to give the assured an opportunity to supply the defect before it could be too late*; and if they neglect to do so, their silence should be held a waiver of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the conditions of the policy.”—Angell on Ins. §§ 244, 248; Tayloe v. Merch. Fire Ins. Co., 9 How. (U. S. Sup. Ct.) Rep. 390; Allegree v. Maryland Ins. Co., 6 Harr. & Johns. Rep. 408.

The charge asked called upon the court to state to the jury, as *a conclusion of law*, that the answer of the president of the defendant corporation, in connection with the facts named in that charge, did not amount to a waiver of the certificate of the notary or magistrate. That proposition was too strong. The answer of the president was made *after certain preliminary proofs had been furnished to the*

company, and was an absolute and unqualified refusal to pay the plaintiff's claim for a loss. It did not refer in any way to the answer which had been given by the secretary of the company to the plaintiff's attorney, before any preliminary proof had been furnished or offered. There is nothing in the answer of the secretary, given before any preliminary proof was attempted, nor in any other fact stated in the charge asked, which would have authorized the court to state to the jury, as a conclusion of law, that the answer of the president, given after the preliminary proofs had been furnished to the company, did not amount to a waiver of the certificate of the notary or magistrate. The charge as asked denied to the jury even the right to infer a waiver from the answer of the president.—King v Pope, 28 Ala. Rep. 601.

As there was evidence tending to show a waiver of the certificate of a notary or magistrate, there was no reversible error in permitting the certificate of the notary-public, Douglass, to go to the jury with the other preliminary proof. Its tendency was to show, that if the company had put its refusal upon the non-production of such certificate, the plaintiff could have supplied the defect; and if there was any error in admitting it, it was clearly error without injury.

The bill of exceptions, so far as it relates to the receipt of Aaron J. Bates, is confused and obscure. It must be construed most strongly against the party excepting. Thus construed, we understand it as showing, that the receipt, with other evidence, was offered "to show a compliance with the preliminary proof before the company;" that when offered for that purpose, the counsel for the company objected to its introduction for any other purpose—thereby conceding its admissibility for the only purpose for which it was offered; and that the court overruled the objection as thus made, and that the receipt was read to the jury "as independent evidence as a receipt only for so much money," but was thus read for the single purpose of showing a compliance with the preliminary proof before the company—in other words, to show that this receipt, as well as other preliminary proof, had been laid

before the company. We see no error in permitting the plaintiff to prove that this receipt was among the preliminary proofs furnished to the company. And if the company had desired the court to inform the jury, that the receipt was evidence for this purpose only, and could not be regarded by them as evidence of the payment of the sum of money mentioned in it, a charge to that effect should have been asked. No such charge was asked, and the single question raised as to the receipt is, whether the plaintiff had the right to show to the jury that he had furnished it, with his other preliminary proofs, to the company, in his effort to comply with the condition of the policy requiring preliminary proofs. We decide that question in the affirmative.

There is no reversible error, and the judgment is affirmed.

STONE, J.—I think this case should be reversed, on that part of the affirmative charge which relates to the doctrine of waiver. The charge asserts, in effect, that if the evidence be believed, the act of the president of the company was a waiver of all defects in the preliminary proof. While I would feel inclined to agree with the majority of the court, if the reply of the president were all the evidence on that point; yet I think, under the facts disclosed in this record; that inquiry should have gone to the jury. The testimony of Allen, if believed, shows that, before the assured had submitted any preliminary proof, his attorney was notified that the company would require a compliance with the conditions of the policy, *to the very letter*. Crandall subsequently, and before the company refused payment, made an unsuccessful attempt to procure a certificate from a magistrate near the scene of the fire; and, I have no doubt, would have furnished the proper certificate, if he could have procured it.

Under this state of the proof, I do not think it can be assumed, as matter of law, that the declaration of the president was a refusal to pay *in any event*. It should have been left to the jury to determine whether the refusal was an unqualified denial of liability, and therefore a waiver

of further preliminary proof.—*Turley v. Nor. Amer. Fire Ins. Co.*, 25 *Wendell*, 374; *Columbian Ins. Co. v. Lawrence*, 2 *Peters*, 25; *Tayloe v. Merch. Fire Insurance Co.*, 9 *How. U. S.* 360–403; *Martin v. Fishing Insurance Co.*, 20 *Pick.* 389, 396; *St. Louis Ins. Co. v. Kyle*, 11 *Missouri*, 278, 290.

BYRD vs. McDANIEL.

[BILL IN EQUITY FOR REDEMPTION OF MORTGAGED SLAVES.]

1. *Limitation of suit for redemption.*—By analogy to the statute of limitations applicable to actions at law for the recovery of personal property, equity will not entertain a bill for the redemption of mortgaged slaves after the expiration of six years from the law-day of the deed, when the mortgagee and his representatives have had continuous possession of the property from the time of the forfeiture, without any acknowledgment, express or implied, of the mortgagor's right; and the fact that the mortgage contained a provision, authorizing the mortgagee to retain the possession of the property until the mortgage debt was paid, does not exempt it from the operation of this principle.

APPEAL from the Chancery Court of Butler.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Redding Byrd, the appellant, on the 15th September, 1846, against the administrator of Bartlett McDaniel, deceased; and sought to redeem certain slaves, which were conveyed by complainant to said McDaniel, by an instrument of which the following is a copy:

“The State of Alabama, } Received of B. McDaniel
Butler County. } five hundred and twenty dol-
lars and twenty-five cents, for four negro slaves, to-wit, one
negro woman by the name of Hannah, her child by the
name of Caesar, one negro boy by the name of Wesley,
and one negro boy by the name of George; which

negroes I warrant and defend the title, from myself and my heirs, this 13th June, 1838. The condition of the above obligation is such, that when I do pay or discharge two notes of hand, payable to the above-named McDaniel, one for two hundred and twenty 25-100 dollars, and one for two hundred and fifty dollars, said notes dated the 13th June, 1838, and made payable one day after date, then the above-named negroes to be delivered, otherwise to belong to the said McDaniel, in his possession, until said notes are discharged, this 13th June, 1838."

(Signed)

"REDDING BYRD."

The original bill alleged, that this instrument was executed on the day of its date, and was intended as a mortgage to secure the payment of the two notes therein mentioned; that the slaves were delivered to McDaniel at the time of the execution of the mortgage, and continued in his possession until his death, which occurred some time in the year 1839, and were in the possession of his administrator when the bill was filed; that the complainant had frequently tendered to the legal representatives of said McDaniel the amount due on said notes, and demanded the restoration of the slaves; and that said representatives "always refused to accede to his request." An amended bill was afterwards filed, alleging that the complainant, within six years after the execution of the mortgage and the delivery of the slaves under it, had tendered to the executor of McDaniel, and afterwards to his administrator *de bonis non*, the full amount due on said notes, and demanded the restitution of the slaves; that no objection was made to the amount tendered, nor to the kind of money tendered; that all of complainant's efforts "were unavailing to induce said deceased to receive said money, and to deliver back said negroes;" and "that his administrators, since his death, have wholly failed and refused so to do, or in any way to comply with complainant's just and reasonable demands." The prayer of the bill was for a redemption, account, and general relief.

The chancellor sustained a demurrer to the bill for want of equity, and his decree is now assigned as error.

JAS. L. PUGH, for the appellant.—The statute of limitations is no bar to the suit. There was no time limited to redeem, and no adverse possession. The legal effect of the mortgage was, that there was no law-day, except when created by payment of the mortgage, or by an offer to pay and refusal to accept and deliver. It was a continuing trust; and the mortgagee held, until his death, in subordination to the mortgagor's right of redemption. *Herbert v. Hanrick*, 16 Ala. 581; *Gunn v. Brantley*, 21 Ala. 633; *Boyd v. Beck*, 29 Ala. 703; *Kane v. Bloodgood*, 7 John. Ch. 90; *Benje v. Creagh*, 21 Ala. 151. The case of *Sims v. Canfield*, 2 Ala. 555, relied on by the appellee's counsel, is not analogous. There, the alleged mortgage was an absolute bill of sale; and the principle settled by the case is, "that an adverse possession of six years, under claim of title, gives such a right of property as will enable the defendant to recover the slave." In this case, there was no repudiation of the trust—no assertion of title by the mortgagee inconsistent with the rights of the mortgagor; but the relation was always recognized, and the mortgagor's rights admitted. In *Nimmo v. Stewart*, 21 Ala. 682, the parties did not occupy the relation of mortgagor and mortgagee.

WATTS, JUDGE & JACKSON, *contra*.—The bill shows on its face that the complainant's right of redemption was barred by lapse of time, in analogy to the statute of limitations applicable to actions at law for the recovery of personal property; and this defense was available to the defendant on demurrer for want of equity.—*Humphreys v. Terrell*, 1 Ala. 650; *Sims v. Canfield*, 2 Ala. R. 555; *Johnson v. Johnson*, 5 Ala. 90; *Bloodgood v. Kane*, 7 John. Ch. 90; *Story's Equity Pleadings*, (3d edition,) §§ 484, 485, 503, and note to 503; *Nimmo v. Stewart*, 21 Ala. 682.

WALKER, J.—Will the redemption of mortgaged slaves be allowed, where the forfeiture occurred more than six years before the commencement of the suit, and the mortgagee and his representatives have been in con-

tinuous possession from the time of the forfeiture, making no acknowledgment, express or implied, of the mortgagor's right? The point involved in the question, which is controverted by the counsel, is, whether the possession after the law-day by the mortgagee, in the absence of account of the profits, or other express or implied recognition of the mortgagor's right, is, of itself, sufficient to justify an application of the analogy to the statute of limitations which prevails at law, or whether there must be, besides the possession and the want of an account for the profits, or other acknowledgment, and the forfeiture, a positive denial of the mortgagor's right.

In *Humphreys v. Terrell*, 1 Ala. 650, the precise question arose. There was no repudiation, by positive act or declaration, of the mortgagor's right; yet the court visited the analogy of the statute of limitations upon the bill for redemption. This decision was made eighteen years ago, and its authority has never since been denied, or even assailed, in this court. It may, and most probably has become, in some cases, a muniment of title to property. Property has probably been sold and bought, in confidence that the decision was a correct exposition of the law, and should shield the title. We do not, therefore, concede the propriety of questioning such a decision; but, as it is assailed as wrong, upon authority and upon principle, we will re-examine the question, and, in doing so, we propose to make a somewhat extended collation of the authorities.

The principle seems to have been first fully recognized in England in the case of *Pearson v. Pulley*, 1 Cases in Chan. 102. In that case, the lord-keeper said, in reference to a mortgage of realty, that "he would have a rule to limit to what time a mortgage shall be redeemable, and conceived twenty years to be a fit time in imitation of the statute of limitations of real actions." The subject thus presented was afterwards often a matter of discussion and adjudication in the English chancery; the case of *Pearson v. Pulley* was always recognized as a correct authority; and the decisions are so uniform and consistent, that the question now under consideration has

become as well settled as it is possible for English authorities to settle any question.

The case of *Whiting v. White*, 2 Cox, 289, was for the redemption by the heir of the mortgagor from the devisee of the mortgagee. There was no denial or act of positive hostility to the equity of redemption; but there were in evidence some declarations, conducing to show an acknowledgment of the mortgagor's right, which were regarded as too loose to be relied upon. The redemption was denied, on account of the twenty years possession by the mortgagee and his devisee. The master of the rolls uses the following language in his decision: "Nothing is more clearly settled, than that a redemption shall not be decreed after a possession of twenty years. The possession must be such as shows that the mortgagee held it as his own estate. If, therefore, any interest has been received, or if any account has been settled between the mortgagor and mortgagee of what is due upon the mortgage, whereby it appears that the mortgagee considers himself as having only a redeemable interest; or, if by any solemn act of the mortgagee, such as a will or settlement made by the mortgagee, it appears that he considers it as redeemable, it shall, as against him and all claiming under him, be held to be so; and the time will only run from the date of such acknowledgment." In the opinion it is intimated, though not decided, that mere verbal admissions would not be sufficient to prevent the bar.

In *Aggas v. Pickerell*, 3 Atk. 225, there appears to have been a simple possession by the mortgagee, without any qualifying proof; and the redemption was denied after the expiration of the period prescribed in the statute, notwithstanding it was shown in excuse that the mortgagor had been for several years out of the kingdom.

The possession of a mortgagee for twenty years, without any payment of interest by the mortgagor, or any thing done or said during that period to recognize the existence of the mortgage, or to acknowledge it on the part of the mortgagee, was held by the master of the rolls, as well as by the lord-chancellor, in *Cholmondeley v.*

Lord Clinton, to be a complete bar to the equity of redemption. The opinions make no requisition of any act of positive hostility to the right of the mortgagor.

In the case of *Corbett v. Barker*, 3 Anstruther, 755, in the court of exchequer, it was held, that a presumption against the mortgagor arises from no payment of the surplus rents being made, and no account delivered, for so long a period of time as twenty years.

In *Foster v. Hodgson*, 19 Vesey, 180, it is declared to be incumbent upon the complainant, in a bill to redeem, to state in his bill circumstances taking his case out of the general rule, that twenty years uninterrupted possession by the mortgagee is, either upon the statute of limitations, or by analogy to it, a bar to his relief.

In *Barron v. Martin*, 19 Vesey, 327, the following clear and emphatic language is used: "It is now perfectly settled, that twenty years possession by a mortgagee is, *prima facie*, a bar to the right of redemption. It lies upon the mortgagor to show any circumstances preventing the possession from producing that effect." There was not in this case a solitary fact, indicating any position hostile to the mortgagor, other than was involved in the act of possession. The decision could not have been placed upon the ground of any positive act renouncing the relation of mortgagor and mortgagee; for, as was done in *Whiting v. White*, *supra*, it denies that parol declarations, acknowledging the mortgagor's right, would keep the redemption open, unless the evidence of them was clear and unequivocal.

Hodley v. Headley, 1 Ves. & B. 536, is another case fully sustaining the proposition, that the possession of the mortgagee, for the period prescribed by the statute, is, *prima facie*, sufficient to defeat the mortgagor's suit for redemption, and that it devolves upon the mortgagor to bring himself within the exceptions to the general rule.

These authorities will suffice to indicate the state of the law in England, upon the question before us. We therefore cite, without commenting upon, or quoting from them, the following cases, which contribute to support the position taken in those set forth.—*Hyde v. Dallaway*,

2 Hare, 528; Edsell v. Buchanan, 2 Vesey, 883; Reeve v. Hicks, 2 Sim. and Stu. 403; Raffety v. King, 1 Keen, 601; 1 Greenleaf's Cruise on Real Property, 113; Jenner v. Tracy, 3 P. Williams, 287; White v. Ewer, 2 Vent. 340; Ashton v. Milne, 6 Sim. 378; 1 Powell on Mortgages, 360; Hansard v. Hardy, 18 Vesey, 455.

The American authorities, with a few exceptions, harmonize with the English. Judge Story, in his Equity Jurisprudence, (2 vol. §§ 1028 *a*, 1028 *b*,) adopts the doctrine asserted by the English authorities, that the analogy to the statute of limitations prevails; and says, "that the time begins to run against the mortgagor from the moment the mortgagee takes possession *in his character as such*; and, if it has once begun to run, and no subsequent admission is made by the mortgagee, it continues to run against all persons claiming under the mortgagor, whatever may be the disabilities to which they may be subjected." Chancellor Kent, in his Commentaries, (vol. 4, page 187,) has taken the same ground. The same remark may be made in reference to the doctrine laid down in Angell on Limitations, (Lec. XXXIV, from § 447 to 467, inclusive;) and also in the Revision of Swift's Digest, (2 vol. 187, 188, 189.)

The subject was brought before the supreme court of the United States, in the case of Hughes v. Edwards, 9 Wheaton, 489, and the opinion of that court was announced in the following language: "In the case of a mortgagor coming to redeem, that court has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff after twenty years adverse possession, fixed upon that as the period after forfeiture and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored." The decisions of Chancellor Kent, in Moore v. Cable, 1 Johnson's Ch. R. 385; Marks v. Pell, 1 Johns. Ch. R. 594, and Demarest v. Wynkoop, 3 Johnson's Ch. R. 129, assert substantially the same doctrine. See, also, Lamar v. Jones & Clark, 3 Harris & McH. 328.

In *Dexter v. Allen*, 1 Sumner, 109, Judge Story said: "If the mortgagee has been in possession of the mortgaged premises for twenty years, taking the profits, without any account, or act done, by which he admits himself to hold it as a qualified estate, the equity of redemption will be presumed to be extinguished or abandoned by the mortgagor."—See, also, *Gordon v. Hobart*, 2 Sum. 401.

In Connecticut, where the right of entry is limited to fifteen years, it is laid down "as a rule, that the mortgagee being in possession, a mortgagor shall not have more than fifteen years to redeem, after his equitable right has accrued, unless the delay shall be accounted for by statute disabilities, or other special circumstances that may be considered equivalent."—*Haskell v. Bailey*, 22 Conn. 569; *Skinner v. Smith*, 1 Day, 127; *Lockwood, v. Lockwood*, 1 Day, 295; *Jarvis v. Woodward*, 22 Conn. 548. See, also, *Harkey v. Powell*, 1 Hawks, 17.

The long array of authorities above cited fully sustain the principle which underlies the decision in *Humphreys v. Terrell*. Opposed to it are the following decisions in Tennessee, Kentucky and South Carolina: *Yarbrough v. Newell*, 10 Yerger, 37; *Wood v. Jones*, Meigs, 517; *Drayton v. Marshall*, Rice's Eq. 373; *Fenwick v. Macy*, 1 Dana, 282; *Pickens v. Walker*, 3 Dana, 169; *Hopkins v. Stevenson*, 1 J. J. Marsh. 344.

While we find *Humphreys v. Terrell* sustained by the great weight of authority, we do not find it so clearly wrong in principle as to justify us in overruling it. We think there is a reply to what is regarded in the case above cited from Meigs' Reports as an insuperable difficulty in the practical application of the principle. That difficulty is, that where the period prescribed in the statute of limitations to an action on the debt secured by the mortgage is longer than the period of limitation to an action for the recovery of mortgaged property, it might be that the mortgagee could defeat the redemption suit of the mortgagor, by the analogy to the statute of limitations for the recovery of property, and afterwards recover the debt. If this be a difficulty at all, it would in no wise be avoided by the adoption of the doctrine opposed

to the decision in *Humphreys v. Terrell*, and maintained by the Tennessee court. If such a thing as the recovery of the debt after the defeat of the equity of redemption by the statute of limitations could occur, it might as easily be where a positive act of hostility to the mortgagor's right was required, as where the possession without any express or implied acknowledgment or recognition is sufficient. But we are inclined to think, that whenever a case occurs presenting such a question, it must be held, that the mortgagee's availing himself of the statute of limitations will be held equivalent to a strict foreclosure of the mortgage, and therefore a bar to a recovery upon the debt.—2 Hilliard on Mortgages, 2, § 2.

It is also objected, that the doctrine of *Humphreys v. Terrell* infringes the principle, that adverse possession is necessary to complete a bar under the statute of limitations. The reply to this is, that the possession of the mortgagee, without any recognition of his relation to the mortgagor, is adverse. This position is sustained by the tenor and effect of all the decisions which maintain the doctrine, and is expressly held in the great case of *Cholmondeley v. Clinton*, 2 Jac. & W. 1. The mortgagee, after forfeiture, has the legal title; a title which, in the eye of a court of law, is deemed complete. Equity attaches to his relation to the mortgagor the duty of an account of the profits, and a credit upon the debt of all the accruing profits. If he holds without the performance of the duty imposed upon him by the law, and does none of those things which recognize the relation, his possession is deemed to be adverse, and to be referrible to the title which he has at law, and not to the qualified title which he has in equity.

It has been decided in this State, that the possession of the mortgagor is not adverse to the mortgagee, unless he throws off his allegiance to the mortgagee.—*Boyd v. Beck*, 29 Ala. 703; *Herbert v. Hanrick*, 16 Ala. Rep. 581. These decisions are reconcilable with *Humphreys v. Terrell*, because there is a distinction between the character of the mortgagor's relation to the mortgagee, and that of the mortgagee to the mortgagor.

It will be found by referring to the cases which we have cited above, that the defeat of the mortgagor's equity of redemption is placed upon the analogy of the statute of limitations. In all the cases where the lapse of time has been made available in favor of the mortgagor to defeat a bill of foreclosure, it has been upon the doctrine of presumption, which usually arises in twenty years. Although it is conceded that the mortgagor is, in some sense, the *quasi* tenant of the mortgagee; yet that was not regarded as a barrier to the presumption that the mortgage debt was paid.—Thrash v. White, 3 Brown's C. C. 289; Christopher v. Sparke, 2 J. & W. 223; Toples v. Baker, 2 Cox, 122; Libson v. Fletcher, 1 Ch. Rep. 59; Giles v. Baremore, 5 Johns. Ch. 545; Collins v. Torry, 7 Johns. 278; Jackson v. The People, 12 Johns. 425; Hughes v. Edwards, 9 Wheaton, 497; Angell on Limitations, §§ 453, 454, 455, 456.

These authorities are decisive to show that the protection of the mortgagor, by lapse of time, was not referrible to the analogy of the statute of limitations. The possession of the mortgagor is, *prima facie*, the possession of the mortgagee, and cannot be, *per se*, adverse. He holds, after the forfeiture, by the permission of the mortgagee, and may be at any time evicted.—Higginson v. Mein, 4 Cranch, 414; Union Bank of La. v. Stafford, 12 Howard, 327; New Orleans Canal & Banking Co. v. Stafford, 12 Howard, 343; Slicer v. Bank of Pittsfield, 16 Howard, 571. Martin v. Bawker, 19 Verm. 525, is the only conflicting authority known to us. The authorities must not, however, be understood as denying that the mortgagor may, by setting up a right or claim as hostile to the mortgagee, effect what would be equivalent to a disseizin, and, having placed himself in adverse possession, avail himself of the statute at law, or its analogy in chancery. We have decided, in Boyd v. Beck, that the mortgagor may become an adverse holder to the mortgagee; and the point is so ruled in Drayton v. Marshall, Rice's Eq. 373, and Bacon v. McIntyre, 8 Metcalf, 87. See, also, Angell on Limitations, § 453.

We conclude, that there is much both of reason and

authority for a distinction between the mortgagor and mortgagee, as to the circumstances under which the statute of limitations is available to the mortgagor and mortgagee respectively, and that the cases of *Humphreys v. Terrell*, and *Boyd v. Beck*, may consistently stand together in the same system of jurisprudence.

The fact that the possession of the mortgagee is adverse to the mortgagor, would not have the effect apprehended, of preventing a conveyance by the mortgagor of the equity of redemption. The equity of redemption after forfeiture, is not a right to the property—a *jus in re*—it is only a right to acquire a title to the property. That right is alienable, and the adverse holding of the mortgagee would not prevent its transfer. *Gordon v. Hobart*, 2 Sumner, 408. When the statute of limitations is applied by analogy in favor of the mortgagee, it is not upon the ground that a right of property in the mortgagor is divested; but chancery, from the similarity to cases at law for the recovery of property, adopts the period prescribed in the statute of limitations, as that beyond which it will not entertain a bill for redemption.

Guided by the reasoning and authorities which we have adduced, we adopt the decision in *Humphreys v. Terrell*, so far as the point presented is concerned, as the law. This decision being the law, the complainant's bill shows upon its face that the right of redemption was lost by the lapse of time; and the decree dismissing it was proper.

But it is said, that the mortgage in this case is of such a character that the mortgagee in possession could never invoke the statute of limitations. There was a class of mortgages, now obsolete, known as 'Welsh mortgages,' under which the mortgagee was not accountable for rents and profits, nor the mortgagor for interest; but the mortgagee kept the possession as an equivalent for the interest, until the mortgagor paid the principal debt. Lapse of time was not available to the mortgagee in this class of mortgages.—1 *Powell on Mortgages*, 373, and note; 2 *Green. Cruise on Real Property*, 114 to 118, inclusive; 2 *Hilliard on Mortgages*, 21, § 39. The mort-

gage here does not belong to that class. It provides that the mortgagee should retain possession, until the debts secured were paid; but there is nothing which relieves the mortgagor from the payment of interest, or the mortgagee from accountability for the profits. We concur in the opinion expressed in *Humphreys v. Terrell*, in reference to a similar mortgage, that there is nothing in the character of the mortgage in this case to prevent the operation of the statute of limitations.

The decree of the court below is affirmed.

RICE, C. J., not sitting.

THOMPSON vs. RAWLES.

[ASSUMPSIT ON PROMISSORY NOTE BY PAYEE AGAINST MAKER.]

1. *When motion to suppress deposition must be made.*—A motion to suppress a deposition, on account of the incompetency of the witness from interest, comes too late (Code, § 2328) when the deposition is offered on the trial.
2. *Discharge of note by contemporaneous oral agreement.*—An executory oral agreement, made contemporaneously with the execution of a promissory note, is not available as a defense to an action on the note, without proof of its performance; and this, notwithstanding its performance is proved to be impossible.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Wilridge C. Thompson, against Joseph C. Rawles, and was commenced in March, 1852; the cause of action being a promissory note, of which the following is a copy:

“One day after date, I promise to pay W. C. Thompson, or bearer, two hundred and fifty dollars, for value received, February 23, 1848. J. C. RAWLES.”

It appeared from the evidence adduced on the trial, as

the same is set out in the bill of exceptions, that the plaintiff and one Devereux, in February, 1837, sold to one A. Livingston, through his agent William Dick, a certain tract of land, or their interest therein; and executed a receipt to said Livingston or Dick in these words:

“Received from William Dick one thousand dollars in cash, and a note on Aaron Livingston for one thousand dollars, payable the first day of January next, with the understanding that five hundred dollars is to be paid by the first day of January next, for our interest in a certain tract of land; and, at a convenient time, we promise to execute a bond to refund the amount paid us, provided the title to said land should not prove to be in us. This 28th February, 1837.” (Signed by said Thompson and Devereux.)

This instrument was assigned to said Rawles, by one Robert Watson, the agent of Livingston, by a written endorsement in these words: “I do hereby transfer the within bond to J. C. Rawles, for A. Livingston, this 25th March, 1842;” which was signed by said Watson.

The tract of land referred to was an Indian reservation, and the title proved not to be in Thompson and Devereux. Thompson stated, in answer to interrogatories propounded to him by the defendant, that “the condition of the note sued on” was as follows: “At the time said note was given, affiant met with defendant in the city of Montgomery; and defendant then stated to him, that he held the bond of affiant and Devereux, given to Aaron Livingston, and that it had been transferred to him. Affiant offered to pay him \$250 for said bond. Defendant looked for said bond, and said he could not find it. Affiant then told him, that if he would get up the bond, and deliver it to affiant within twelve months, he would give him \$250. Defendant said, he could and would do so; that he knew where Livingston was, and could get the bond from him, if he himself did not have it, within much less time than twelve months. Upon these representations and promises of the defendant, affiant advanced \$250 to him, and took from him the note sued on, which, with the interest thereon, was to be repaid to (?) unless

the defendant got up and delivered said bond." The plaintiff further stated, that the "bond" above referred to was not the receipt of himself and Devereux above copied, but a bond which they had executed to Livingston as stipulated in said receipt; and that the defendant had never procured and delivered up the bond. On the part of the defendant it was contended, and evidence was adduced by him tending to show, that the "bond" referred to was the said receipt, and that no other bond was ever executed to Livingston by Thompson and Devereux.

During the trial, the defendant offered to read the deposition of Livingston. The plaintiff objected to it, on the ground that the witness was incompetent from interest. The court overruled the objection, because it came too late, and allowed the deposition to be read as evidence to the jury; and the plaintiff excepted.

The defendant offered in evidence a letter written by Livingston to the plaintiff, (but not shown to have ever been in the plaintiff's possession,) dated the 28th May, 1852, and in these words:

"Dear Sir: I am informed by Mr. J. C. Rawles, that you are of the opinion that you and J. Devereux gave me a bond to refund the one thousand dollars which was paid you by William Dick for the 'Sally' tract of land. Now, I assure you that there never was any bond given, more than the receipt acknowledging the receipt of the money, which is now the property of Mr. J. C. Rawles; and further, if there ever was one given, I have no recollection of it; and as you seem to apprehend there was, I now again relinquish all the right I have or may have had to J. C. Rawles."

The court allowed this letter to be read to the jury, "not as evidence of the facts therein stated, that no bond to refund had been given to Livingston, &c., but as evidence of a transfer or relinquishment of Livingston's right to the defendant;" and the plaintiff excepted.

There were several other exceptions to the rulings of the court on the evidence, which require no notice.

"The court charged the jury, among other things, that

if they believed from the evidence that the two hundred and fifty dollars, for which the note sued on was given, was intended by the parties as a payment to the defendant for his interest, legal or equitable, in the paper receipt herein above set forth, and in discharge of the plaintiff's liability arising upon it, or of the liability of the plaintiff and Devereux; and if the note sued on was executed and delivered, with the understanding between the parties, that it was not to be valid or binding, if the refunding bond provided for by the receipt was taken up by the defendant, for the plaintiff, within the time agreed on between them; and that no such bond was ever given or existed,—then the note was without consideration, and the plaintiff was not entitled to recover.”

The plaintiff excepted to this charge, and he now assigns it as error, together with the rulings of the court on the evidence.

CLOPTON & LIGON, with whom were WILLIAMS & GRAHAM, for the appellant.

WM. P. CHILTON, and WM. F. BARNES, *contra*.

STONE, J.—The motion to suppress the deposition of Livingston came too late, and was rightly overruled. *McCreary v. Turk*, 29 Ala. 244, and authorities cited.

[2.] The circuit court mistook what we consider the legal bearing of the defense relied on in this case. It raised no material question on the consideration of the note, for the testimony clearly shows that Mr. Thompson gave to Mr. Rawles, at the time the note was executed, two hundred and fifty dollars in money, the amount for which the note was taken. On this point, the appellant and appellee are agreed. The parties also agree that, at the time the note was executed, there was a contemporaneous oral agreement in reference to what should be a discharge of the liability imposed by the note. On the terms of that collateral oral agreement, the parties are widely at issue.

As we understand this record, we think the only phase in which this defense could be made available to the

defendant, was that considered and settled in the case of McNair and Wife v. Cooper, 4 Ala. 660. The oral agreement, without its performance, was worth nothing. If, however, the parties orally agreed, that if defendant would do a certain thing, it should operate a payment and discharge of the note, and the defendant thereupon did do and perform that certain thing, then the defense was made out. It should have been left to the jury to determine what the terms of the collateral agreement were, and whether defendant had complied with them.

It results from what we have said, that it will not profit the defendant, if he succeed in establishing the impossibility of compliance with the terms of that agreement on his part; in other words, if he prove there is in fact no such outstanding bond or paper, as that which he agreed to procure or deliver up. It is the *performance* of the collateral agreement, which makes out the defense.

It would seem from the evidence recited in the bill of exceptions, that one of the important inquiries in this case is, what was the paper which Rawles was to procure, or deliver up? If it was not the paper which he procured from Livingston's agent, but a bond given pursuant to the terms of that agreement, then it seems to be conceded that he never complied with such agreement.

The letter of Livingston to Thompson, so far as it speaks of past or present outside facts, was inadmissible. As evidence of a transfer then made, perhaps it was properly admitted.

What we have said above will sufficiently guide the primary court in another trial.

Reversed and remanded.

BARTEE AND WIFE *vs.* JAMES, ADM'R, &C.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Appeal tried on bill of exceptions.*—An appeal from a decree of the probate court, rendered on the final settlement of an administrator's accounts, is required to be tried on the bill of exceptions, (Code, § 1891;) consequently, the appellate court will not look to other parts of the record, for supposed errors not disclosed by the bill of exceptions.
2. *Specific objection to deposition.*—A motion to suppress a deposition on a specified ground is a waiver of all other grounds of objection.
3. *Objection to deposition good in part only.*—A motion to suppress two depositions, on a specified ground which is not well taken as to one of them, may be overruled entirely.
4. *Construction of bill of exceptions.*—In a probate case, tried before the court without the intervention of a jury, a recital in the bill of exceptions, that the appellants "objected to the 5th volume of Porter's Reports," which was "offered and read in evidence" by the appellee, "being read for the purpose of proving any fact or facts; but the court overruled their objection, and they excepted,"—is not sufficient to show that the volume was read in evidence for the purpose of proving any fact or facts.

APPEAL from the Probate Court of Chambers.

IN the matter of the estate of Sylvester James, deceased, on final settlement of the accounts of Lee L. James, the administrator, who was cited to a settlement by James L. Bartee and wife; Mrs. Bartee having been the intestate's widow. The several assignments of error, together with the material facts on which they are predicated, are as follows:

"1. That the court erred in refusing to suppress the depositions of Hiram James and William G. James, on motion of the appellants, as shown by the bill of exceptions." The motion to suppress these depositions was made "before the cause was announced ready for trial;" the only specified ground of objection being, "because said witnesses, and each of them, fail and refuse to answer the third and fourth cross-interrogatories propounded to them by said Bartee and wife." The answers of these witnesses are set out in the bill of exceptions,

but it is not necessary to state them. The appellants reserved an exception to the overruling of this motion.

"2. That the court erred in permitting the 5th volume of Porter's Reports to be read in evidence to prove the existence of the statute law of North Carolina." In relation to this matter the statements of the bill of exceptions are as follows: "The administrator then read as evidence, from the Revised Code of North Carolina, adopted by the general assembly at the session of 1854, section 17 on page 244, and section 12 on page 300; and also offered and read in evidence Iredell's Digest of the North Carolina Reports, volumes 1, 2 and 3, and the 5th volume of Porter's Reports of the supreme court of Alabama. Bartee and wife objected to the 5th volume of Porter's Reports being read for the purpose of proving any fact or facts; but the court overruled their objection, and they excepted."

"3. That the court erred in not charging the administrator with the value of the slaves moved to be charged to him, upon the proof shown by the record and the bill of exceptions." As no exception was reserved by the appellants to the ruling of the court here referred to, the opinion of the court renders it unnecessary to state the evidence relating to the slaves in controversy.

"4. That the court erred in allowing the administrator compensation for extra services, beyond his regular commissions, as shown by the record and bill of exceptions." The decree shows that the administrator was allowed \$200, as compensation for extra services. The bill of exceptions sets out the evidence adduced by the administrator to show the value of the services rendered by him, and, after stating "substantially all the evidence in the cause, upon which the court rendered a decree against Bartee and wife on the issues joined," adds, "Bartee and wife objected to compensation and attorney's fees being allowed to the administrator;" but it is not shown that any exception was reserved by them to the ruling of the court in allowing extra compensation.

The other assignments of error require no notice.

BARNES & ALLISON, for the appellants.

BROCK & PRESLEY, *contra*.

RICE, C. J.—This is one of the appeals which section 1891 of the Code requires us to try on the bill of exceptions.—Turner and Wife v. Key's Adm'r, 31 Ala. 202.

"The rule is well settled, that a party, asking the action of the court on any subject, must be prepared to sustain the action demanded in the precise terms in which the request is made; and the refusal of a court to act in the manner requested will not be error, although a portion of the request might have been properly granted, and should have been, if asked independent of the other part."—Carmichael v. Brooks, 9 Porter, 330.

Under that rule, we cannot reverse the decree in the present case, on account of the overruling of the motion of appellants to suppress "the depositions of Hiram James and William G. James." They put their motion on a specified ground, to-wit, the failure to answer the third and fourth cross-interrogatories; and by putting it on that specified ground, they waived all other grounds. Creagh v. Savage, 9 Ala. R. 959. The specified ground must fail *in toto*, because it certainly is not good *in part*, to-wit, as to the deposition of Hiram James. He certainly has sufficiently answered the third and fourth cross-interrogatories. We do not decide what should have been done, if the motion had sought the suppression of the deposition of William G. James only. The motion asked the suppression of *both depositions*, which was clearly asking too much, and which therefore justified the court in overruling it *in toto*.—Walker v. Smith, 28 Ala. 569.

The trial was by the probate judge, without the intervention of a jury. The bill of exceptions purports to set forth "substantially all the evidence in the cause;" and by agreement of counsel, the law of North Carolina therein referred to, forms part of it. The bill shows that the plaintiff read as evidence the "5th volume of Porter's Reports of the supreme court of Alabama;" and that the appellants objected to its being read "for the purpose of proving any fact or facts;" but the bill utterly fails to

show that it was offered, admitted, or read for any such purpose. Construing the bill most strongly against the party excepting, as we are bound to do, we cannot say that the 5th volume of Porter's Reports was admitted as evidence to prove any fact or facts. Their saying that they objected to its being read for such a purpose, does not prove, as in their favor, that it was read for any such purpose. And we cannot put the court below in error, by construction or intendment, especially when, as here, the trial was by the judge himself, and when the 5th volume of Porter's Reports might have been read as evidence to him of some part of the law of Alabama, which he deemed important in the case. To justify us in reversing a decree of the court below, it is not enough that we do not see that its action was right; we must see that its action was wrong. Parties who seek the reversal of judgments, cannot gain anything by obscurity or uncertainty in the statement of the precise point decided in the primary court. With these views, we cannot reverse upon the statement contained in the bill of exceptions in relation to 5th Porter's Reports. There *may* possibly have been error in that respect, but it is not made to appear with sufficient clearness.

The bill of exceptions does not show that any issue was joined as to the allowance of compensation and attorney's fees to the administrator, nor that any such allowance was made: we therefore decide nothing as to such allowance. As we are required to try the case on the bill of exceptions, we cannot look to other parts of the transcript for supposed errors not disclosed in the bill itself. And as it fails to point out or disclose with sufficient clearness anything which justifies us in reversing, we must affirm the decree.

BROWN vs. COCKERELL.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Abstract charge*.—A charge which is partly abstract may be refused entirely.
2. *Adverse possession between coterminous proprietors*.—If two coterminous proprietors of land agree upon a dividing line, jointly construct a dividing fence in accordance with that agreement, and occupy up to that fence, their possession is adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, ripens into a perfect title.
3. *Same*.—Where a dividing fence is run beyond the true line, whether from inadvertence, ignorance, or convenience on the part of the owner, and with no intention to claim up to it as the dividing line, his possession is not adverse to the adjoining proprietor; nor can it, when accompanied by acts of ownership, and continued for the length of time prescribed by the statute of limitations, perfect a title as against such adjoining proprietor.
4. *How affected by subsequent agreement*.—If a perfect title to the land in dispute has vested in one of the parties, by virtue of his adverse possession for the length of time prescribed by the statute, his title cannot be divested by a subsequent parol agreement with the adjoining proprietor to have the boundary line between them surveyed; but such agreement is a matter for the consideration of the jury, in determining the question of adverse possession.
5. *Notoriety of possession*.—Notoriety is an important constituent of an adverse possession, as a fact from which notice or knowledge may be presumed; but, where actual notice or knowledge is brought home to the party to be affected thereby, it is not necessary that the possession should be notorious.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by William J. Cockerell, against Robert L. Brown, and was commenced on the 10th April, 1857. The land in controversy consisted of a small tract, containing about five acres, which the plaintiff claimed as a part of section 19, in township 20, range 2 west, and which the defendant claimed as part of section 30 in said township and range; the said sections adjoining each other, and the controversy turning on the location of the boundary line between them. The material facts of the case, so far as they relate to the questions here presented for revision, may be thus stated:

Section 19 lies directly north of section 30. In 1841, the south half of section 19 belonged to one Emerson Cockerell, a brother of the plaintiff; while the north-east quarter of section 30 then belonged to George A. Brown, who was a brother of the defendant, and the north-west quarter to one W. R. Richardson. During that year, Emerson Cockerell and George A. Brown, by agreement, had the section line between them run by the county surveyor; the plaintiff in this suit and said Richardson being the chain-bearers. The line thus established was adopted by the parties as the dividing line between them, and a dividing fence was jointly constructed by them upon or near it; each party building his half of the fence on his own land, and connecting the two portions where they met by a lock, or panel run diagonally from one to the other; and this fence has remained ever since. At the time of this survey, there was a dividing fence between Emerson Cockerell and Richardson, which run on or near the section line between them as shown by the marks left by the United States surveyors. In 1843, while Richardson was still in possession of his quarter-section, and cultivating up to the division fence between him and Emerson Cockerell, he sold and conveyed by deed to the defendant in this suit; and in 1845, George Brown, being still in possession of his quarter-section, and cultivating up to the dividing fence between him and Emerson Cockerell, also sold and conveyed to the defendant. More than ten years before the commencement of this suit, but at what precise time the record does not show, Emerson Cockerell sold and conveyed his land to the present plaintiff. Under these conveyances, the plaintiff and defendant took possession of their respective tracts, cultivated up to the dividing fence between them, and exercised other acts of ownership. In February, 1856, a dispute having arisen between them about their stock trespassing, the defendant, at the request of the plaintiff, had the line again run by the county surveyor; and the line thus established throws the land now in controversy within the plaintiff's section. The defendant was present at this survey, and expressed himself dissatisfied with it; but he did not

have the line again run by another surveyor, as the plaintiff had told him he might do if dissatisfied.

On these facts, the defendant asked the court to give the following charges :

“1. If the jury believe that Emerson Cockerell and George A. Brown had the line in dispute surveyed in 1841, and agreed upon the line, and built a joint fence upon the line agreed on ; and that the defendant, and those under whom he claims, have ever since been in possession of the lands on his side of the line and fence so agreed on, they must find for the defendant.

“2. If the jury believe from the evidence that, more than ten years before the commencement of this suit, there was a fence from one end of the section corner to the other, along or near the line, except a small strip between the corner of Richardson’s fence and the half-way corner of George Brown’s fence ; and that the defendant, more than ten years before the commencement of this suit, completed said strip of fence, so as to make it continuous from corner to corner, and has ever since been in possession of all the land on his side of said fence, exercising acts of ownership over it, with the knowledge of the plaintiff, or those under whom he claims title ; and that the plaintiff, or those under whom he claims title, had such knowledge more than ten years before the commencement of this suit, they must find for the defendant.

“3. If the jury believe from the evidence that the defendant, or those under whom he claims title, more than ten years before the commencement of this suit made a dividing fence, on or near what was supposed to be the dividing line of the two sections, and has ever since been in possession of the land on his side of said fence and line, cultivating the same, and exercising acts of ownership over it, they must find for the defendant.

“4. If the jury believe the last-mentioned facts from the evidence, no verbal agreement of the defendant in 1856 to another survey would be so far binding as to enable the plaintiff to recover any land found by such survey to belong to him on the defendant’s side of the line so agreed on.”

The court refused to give either one of these charges, "without the following qualification: 'If the evidence shows that the land in controversy belonged to the plaintiff, and to those through whom he claims, and the defendant would defeat that claim by an adverse possession of ten years, he (the defendant) must, to entitle him to such a plea, show that his possession has been notorious, uninterrupted, and under an adverse claim of title, for said period of ten years;' and did give them, of its own motion, with said qualification."

The refusal of the several charges asked, and the qualified charges given, to which the defendant excepted, are now assigned as error.

REAVIS & COOKE, and S. F. HALE, for the appellant, made the following points:

I. The first charge asked should have been given without qualification, because—

1. A parol agreement between two proprietors of adjoining lands, to employ a surveyor to run the dividing line between them, which agreement is executed, and possession held accordingly for the period prescribed by the statute of limitations, or even for a long time short of that period, is binding and conclusive on the parties and those claiming under them.—Boyd v. Graves, 4 Wheaton, 513; Smith v. McAllister, 14 Barbour, 434; Lindsay v. Springer, 4 Harrington, (N. J.) 547; Spaulding v. Warren, 25 Vermont, 316; Wilson v. Hudson, 8 Yerger, 398; Moody v. Nichols, 16 Maine, 23; Boston Railroad v. Sparhawk, 5 Metcalf, 469; Riley v. Griffin, 16 Geo. 142; Brown v. Edson, 23 Vermont, 436; Hobbs v. Cram, 2 Foster, (N. H.) 130; Mosher v. Berry, 30 Maine, 90; Ackley v. Buck, 18 Vermont, 396; Rockwell v. Adams, 6 Wendell, 467; Gilchrist v. McGee, 9 Yerger, 45; Beecher v. Parmele, 9 Vermont, 352; Burton v. Lazell, 16 Vermont, 158; Berry v. Garland, 6 Foster, (N. H.) 473; Jackson v. McConnell, 12 Wendell, 421; Rockwell v. Adams, 7 Cowen, 761; Blair v. Smith, 16 Missouri, 273; Jackson v. Van Cortlandt, 11 Johns. 137; Orr v. Foote, 10 B. Monroe, 392.

2. The defendant having been in possession more than ten years, with the knowledge of the plaintiff and those through whom he claimed, had thereby acquired a title under the statute of limitations.—Clay's Digest, 329, § 93, in connection with Session Acts 1853-4, p. 71; Rawls v. Kennedy, 23 Ala. 240; Hallett v. Forest, 8 Ala. 264; Stein v. Burden, 24 Ala. 130. And the title thus acquired could not be lost by the defendant's parol declarations. Stuyvesant v. Tompkins, 9 Johns. 61; Nichol v. Lytle, 4 Yerger, 456; Moody v. Nichols, 16 Maine, 23; Daniel v. Ellis, 1 A. K. Mar. 61; Gilchrist v. McGee, 9 Yerger, 455.

II. The second charge asked should have been given, because the facts assumed in it, which were established by the evidence, constituted adverse possession; and that commenced when the plaintiff, or his vendor, knew that the defendant was in possession of the land, exercising acts of ownership over it,—which was more than ten years before the commencement of the suit.—2 Smith's Leading Cases, by Hare & Wallace, 560-68; Herbert v. Hanrick, 16 Ala. 594; Bryan v. Weems, 29 Ala. 423.

III. The third and fourth charges should have been given as asked, for the reasons above assigned.

IV. The qualification annexed by the court to the several charges asked, should not have been given. In addition to the reasons above stated, the qualification was erroneous, 1st, because it left the jury to say what constituted an adverse possession, when that is a question of law; 2dly, because it asserts that the defendant's possession must have been "under an adverse claim of title," when color of title was sufficient, and was clearly shown; 3dly, because it confined the adverse possession to the defendant alone, when he had a right to connect his vendor's adverse possession with his own in order to complete the statutory bar; and, 4thly, because it required that the possession should be *notorious*, when there was evidence from which the jury might properly have inferred *notice*, which would have dispensed with the necessity of *notoriety*.—Authorities last cited. The qualification was,

moreover, too comprehensive, in excluding from the jury a material portion of the defendant's evidence.

I. W. GARROTT, *contra*.—1. The first charge asked was properly refused, because (if for no other reason) it was partly abstract. The title to the land in controversy involved the location of the boundary line between the two sections, embracing both the north-east and the north-west quarters of section 30; while the agreement between Emerson Cockerell and George Brown applied only to the boundary line of said north-east quarter.

2. The second charge asked was also abstract, inasmuch as it assumed the existence of a fact not proved, to-wit, that the plaintiff or his vendor had knowledge of the possession by the defendant and those under whom he claimed.

3. The principle embraced in the several charges asked, is, that a simple possession of land, *per se*, not shown to be adverse, or under claim of title, is sufficient, if continued for ten years, to make the statute of limitations an available defense. The principle involved in the charges as qualified and given, is, that such possession, to be available, must be notorious, uninterrupted, and under an adverse claim of title. It is submitted, that the rulings of the court are correct, and sustained by the following authorities: Herbert v. Hanrick, 16 Ala. 595; Badger v. Lyon, 7 Ala. 567; and authorities cited in Herbert v. Hanrick, *supra*.

WALKER, J.—Emerson Cockerell and George A. Brown were, in 1841, coterminous proprietors, to the extent of the eastern half of the dividing line between sections 19 and 30. Emerson Cockerell and one Richardson were coterminous proprietors to the extent of the western half of that line. Emerson Cockerell and George A. Brown agreed upon a dividing line as far as they were coterminous proprietors, that is, to the extent of one half the section line, measured from the eastern end of it. The land now in controversy extends westward beyond the point at which the line so agreed upon ended. There was

no evidence that the line agreed upon between Emerson Cockerell and George A. Brown extended more than half the length of the dividing line between the two sections. There was, therefore, no evidence upon which a charge in reference to the establishment, by agreement of Emerson Cockerell and George A. Brown, of the northern boundary line of the land in dispute, in its full extent from east to west, could legitimately be predicated. From the agreement between Emerson Cockerell and George A. Brown, no inference of a right to defend the suit as to the entire area in controversy could be drawn, because that agreement only applies to so much of the land as lies east of the middle point on the dividing line between the two sections. For this reason, the first charge asked was partly abstract, and there was no error in the refusal to give it.

[2.] But, if the evidence had justified the charge, or if the charge had not asserted a defense broader than the evidence, the refusal of it would have been a palpable error. If two coterminous proprietors agree upon a dividing line, and follow up that agreement by the joint construction of a dividing fence, and afterwards occupy up to that fence, the possession is certainly adverse; and, if continued for the period prescribed in the statute of limitations, will confer a complete title. Besides the numerous authorities cited by the appellant's counsel on this point, we refer to *Burrell v. Burrell*, 11 Mass. R. 294; and *Brown v. McKinney*, 9 Whar. 567.

The authorities do not all agree as to the effect of a parol agreement for the establishment of a dividing line, followed by possession up to that line, for a period less than is necessary to perfect a bar under the statute of limitations. The defendant has been in possession for the time mentioned in the statute. That question cannot arise in this case, and we pass it without a decision of it. See the authorities upon the briefs, and *Boyd v. Graves*, 4 Wheat. 513; and *Tolman v. Sparhawk*, 5 Met. 475.

[3.] The second charge refused by the court places the defendant's claim upon the facts, that there had been for more than ten years before the commencement of the

suit a dividing fence, erected by him and those from whom he derived title, leaving the disputed area on his side; and there had been during that time possession and the exercise of acts of ownership up to such fence by him, known to the plaintiff or his predecessors. A dividing fence may be extended beyond the true line, placing within the enclosure of one coterminous proprietor a portion of the other's land, through mere inadvertence, or ignorance, or from convenience, and with no intention to claim it. In such a case, the possession up to the dividing fence would not be adverse. The point is so decided in *Gilchrist v. McLaughlin*, 7 Iredell, 310; and *Brown v. Gay*, 3 Greenleaf, 126.

It must be conceded that the charge is fully sustained by the decision in *French v. Pearce*, 8 Conn. 439, and in some other cases. But it is wrong upon principle. If a party occupies land up to a certain fence, because he believes it to be the line, but having no intention to claim up to the fence if it should be beyond the line, an indispensable element of adverse possession is wanting. The intent to claim does not exist, and the claim which is set up is upon the condition that the fence is upon the line. Or, if the fence is put over the line from mere convenience, the occupation and exercise of ownership are without claim of title, and the possession could not be adverse. This is the only view of the question which we think can be reconciled with the previous decisions of this court. *Herbert v. Hanrick*, 16 Ala. 581; *Hinten v. Nelms*, 13 Ala. 231; *Badger v. Lyon*, 5 Ala. 567; *Benje v. Creagh*, 21 Ala. 156; *Knight v. Bell*, 22 Ala. 198; *Harrison v. Pool*, 16 Ala. 167; *Abercrombie v. Baldwin*, 15 Ala. 363; *Johnson v. Toulmin*, 18 Ala. 50; *Cotten v. Thompson*, 25 Ala. 671; *Bryan v. Weems*, 29 Ala. Rep. 423. These authorities show, that the mere possession of another's land is not, *prima facie*, adverse to the true owner. Possession is *prima-facie* evidence of title, and a recovery in ejectment may be had upon it. But, when it is shown that the true title is in another, the intendment in favor of the possession ceases. The law, then, will not presume that the possessor does the wrong of disseizing the true

owner. It devolves upon him the burden of showing the hostility of his possession to the true owner.—Angell on Lim. §§ 380, 384, 385.

The charge does not present the case of two coterminous proprietors building by consent a fence, as the dividing fence between them, and subsequently occupying up to it. In such a case, there would be a clear assertion that such was the dividing line, and that each claimed title up to it; and the intention to claim up to it would be manifest. In such a case, the authorities agree that the possession would be adverse.—Burrell v. Burrell, 11 Mass. 294; Smith v. McAlister, 14 Barb. 434. It would, in such case, be evident, that they claimed the fence to be the dividing line. The law would be the same, if one of the coterminous proprietors should build a fence *as the dividing fence*, and should occupy with a claim, manifested by words or acts, that such was the line up to which his land extended. But neither of those is the case made by the charge.

The third charge asked is obnoxious to the same objections with the second.

[4.] In relation to the 4th charge requested: If the title to the disputed land had vested, by virtue of the statute of limitations or otherwise, in the defendant, the verbal agreement to a survey of the line certainly would not divest the title. The title to real estate, no matter in what way acquired, could not be divested by any such agreement. The agreement was a circumstance to be considered by the jury, in determining the question of adverse possession. Its effect upon the question of adverse possession, and therefore upon the plaintiff's right of recovery, was for the jury. On that account, the court did not err in refusing this charge.

[5.] The court charged the jury, that a possession, to be adverse, must be "notorious, uninterrupted, and under an adverse claim of title." The law is in many books laid down in language equivalent to, and in some identical with, this charge.—Herbert v. Hanrick, 16 Ala. 581–596; Benje v. Creagh, 21 Ala. 151–156; 2 Smith's Leading Cases, top page 562, Amer. Note to Taylor v. Horde;

Angell on Limitations, 480, § 392. But why is it that notoriety of possession is necessary? The principle asserted in *Benje v. Creagh*, "that the whole doctrine of adverse possession rests upon the presumed acquiescence of the owner," is undoubtedly correct. Acquiescence cannot be presumed, unless the owner has, or may be presumed to have, notice of the possession. Notoriety and openness of possession are, therefore, important constituents of the adverse possession, as facts upon which the presumption of the owner's knowledge may be predicated.—See the subject discussed in *Smith's Leading Cases*, *supra*; also, Angell on Limitations, 491, § 398. This notoriety of possession cannot be important or necessary, if in fact the possession was known to the true owner. It could not be requisite for the defendant to prove that his possession was notorious, in order to authorize the presumption of the owner's knowledge, when in fact such knowledge really existed. The evidence in this case conduced to show that the plaintiff knew of the defendant's possession. It was proper for the court in its charge, in such a case, to permit a verdict for the defendant, although the possession was not notorious, if the jury believed that it was known to the plaintiff. This the charge erroneously omits to do.

The judgment of the court below is reversed, and the cause remanded.

DEENS vs. DUNKLIN.

[ACTION ON PROMISSORY NOTE GIVEN FOR HIRE OF SLAVES.]

1. *Rescission of contract of hiring*.—The recovery of a judgment in trover, by the owner against the hirer, for the conversion of a hired slave during the term, together with satisfaction thereof, establishes a rescission of the contract, and estops the plaintiff from afterwards maintaining an action on the note given for the hire; but the mere institution of an action of trover has no such effect, when the action is shown to have been successfully defended on the merits.

2. *Recoupment of damages.*—Expenses, necessarily incurred by the hirer, in the successful defense of an action of trover, instituted against him by the owner, for the alleged conversion of the slave during the term, cannot be recouped in a subsequent action on the note given for the hire.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. NAT. COOK.

THIS action was brought by Sarah K. Deens, against W. A. T. Dunklin and J. R. Hartley; was commenced on the 28th October, 1857; and was founded on the defendants' promissory note for \$300, dated December 22d, 1854, payable on or before the 1st January, 1856, to the plaintiff or bearer, and purporting on its face to have been given for the hire of two slaves, Abe and Jake, for the year 1855. The pleas were, "1st, the general issue; 2d, former judgment; 3d, former recovery; 4th, payment; 5th, set-off; 6th, tender; and, 7th, fraud;" all of which were pleaded "in short by consent." The cause was tried on an agreed statement of facts, which was as follows:

"The note sued on was given to the plaintiff for the hire of two slaves, Abe and Jake, for the year 1855; the services of each being valued at \$150. The sum of \$151 was paid on said note, on the 2d February, 1856; which was the price agreed on for the hire of Jake, together with the interest thereon; and this is the only payment ever made on said note. The said slaves were hired to cut logs, and to work about a steam saw-mill in Covington county, belonging to the defendants. About one month after they were hired, and had begun to work at said mill, the boy Abe was killed by the machinery of said mill. Some time during the year 1855, and before said note fell due, the defendants tendered to the plaintiff in specie the full amount of the hire of Abe for the year 1855, to-wit, the entire amount of the note sued on so far as the hire of Abe constituted the consideration thereof, being the whole of it except that part paid and credited as aforesaid; but the plaintiff refused to receive any part of it. The defendants again tendered to the plaintiff in specie, at the time of the payment of said

\$151, the whole amount due on said note, with the interest thereon; but the plaintiff refused to receive any part of it, except the \$151 for the hire of Jake as aforesaid. The plaintiff then brought an action of trover against the defendants, in the circuit court of Covington, to recover the value of Abe, who had been killed as aforesaid; alleging that said negro had been killed by defendants' wrongful act, while hired to them as aforesaid; and prosecuted said suit to a final trial on the merits, which resulted in a verdict for the defendants, at the spring term of said court, 1857. Upon said trial, the issue between the parties was, whether said slave was killed by the defendants' wrongful act; and upon this issue the jury returned a verdict for the defendants, as above stated. In order to defend themselves against said suit, the defendants were compelled to employ counsel, at a heavy expense; and they were thus forced to pay out, for attorneys' fees and other necessary expenses, the sum of \$200, which they never would have had to pay but in consequence of the plaintiff's refusal to receive said money when tendered, and prosecuting said action of trover against them. The defendants never refused, but were always ready and willing, to pay the whole balance due on said note, with the interest thereon, until after the plaintiff had prosecuted said action of trover against them to a final hearing; after which, to-wit, on the 1st October, 1857, the plaintiff demanded of them the balance due on said note, and they refused to pay the same, and still refuse to do so. This suit was brought to recover the balance due on said note, being the hire of Abe, with interest thereon, and for no other demand."

"This being all the evidence in the cause, the court charged the jury, that if they believed the evidence, the plaintiff could not recover anything in this action, except the hire of Jake from the 1st January, 1855, up to the time when he was killed; to which charge the plaintiff excepted," and which she now assigns as error.

D. W. BAINE, for the appellant.

JNO. K. HENRY, *contra*.

STONE, J.—The vice of the argument made for the appellee consists in the fact, that it assumes that the plaintiff had the right to rescind the contract of hiring at her own election. If the hirer had violated the terms of the contract of hiring, then the owner would be armed with power, at her election, to treat the contract as rescinded, and to sue in trover as for a conversion. See *Mosely v. Wilkinson*, 24 Ala. 411; *Hall v. Goodson*, 32 Ala. 277. If, however, the hirer had not violated his contract, the owner had no right to rescind the contract, without the consent and concurrence of the hirer.

The suit by the plaintiff, to recover the value of her slave, did not and could not operate a rescission of the contract. It was, at most, a declaration of hers, evidenced by her suit, that she considered the contract broken by the hirer, and that she elected for that breach to rescind. The verdict and judgment negatived the existence of the breach, and affirmed the continuing obligation of the contract. These facts do not furnish the elements of an estoppel in this suit.

Neither is there anything in the circumstances attending the former suit, or the expenses to which the defendants were thereby put, which gave to them a cause of action, or right to recoup the damages in this case. Conceding that her claim was unfounded, there is no evidence that she was influenced by malicious motives. *Luddington v. Peck*, 2 Conn. 700.

If the plaintiff had recovered in the former suit, that recovery and satisfaction of the judgment would have established the rescission of the contract, and would have estopped the plaintiff from afterwards asserting its continuing efficacy.—*Smith v. Hooks*, 19 Ala. 101. The present case rests on a different principle.

Judgment of the circuit court reversed, and cause remanded.

JAMES *vs.* CLARKE COUNTY.

[ACTION TO RECOVER STATUTORY PENALTY FOR FAILURE TO WORK ROAD.]

1. *Mode of warning hands.*—When an overseer of slaves is warned to work on a public road, (Code, § 1166,) the failure to send the slaves under his charge is his default, and not that of his employer; nor is the employer rendered liable to the statutory penalty, (Code, § 1169,) by the fact that, when informed by the overseer of such warning, he directed the latter not to send the slaves to work on the road.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. THOS. A. WALKER.

THIS proceeding was instituted against Lorenzo James, before a justice of the peace, to recover the statutory penalty for a default in not working on a public road. The justice having rendered a judgment against the defendant, the latter sued out a *certiorari* before the probate judge, and removed the proceeding into the circuit court. On the trial in the circuit court, numerous exceptions were reserved by the defendant to the rulings of the presiding judge, of which it is only necessary to notice the one on which the case is here made to turn, and which is thus stated in the bill of exceptions: "Evidence was introduced tending to show, that seven slaves, belonging to the defendant, were apportioned to work on a public road, for neglecting or refusing to work which the defendant was returned as a defaulter; that these seven slaves were plantation hands, and lived on the defendant's plantation, under the charge of an overseer, at some distance from the residence of the owner, but in the same road precinct; that the only notice to send these hands to work on said road was given, in writing, to the overseer, at least two days before the time when they were required to work on said road, but no other notice was given to the defendant by the overseer of the road; that the defendant's overseer, who had been notified, informed the defendant of it, and the defendant directed him not to send his hands to work

on the road. The defendant asked the court to instruct the jury, that if the notice to send his hands to work on the road was given to his overseer, and not to himself personally, then he was not liable for a default in not sending them; which charge the court refused to give, and the defendant excepted." The refusal of this charge, with other matters, is now assigned as error.

GOLDTHWAITE & SEMPLE, for the appellant.

THOMAS WILLIAMS, *contra*.

RICE, C. J.—The mode of warning hands to work on a public road is prescribed by section 1166 of the Code. The defendant was not warned in that mode. His overseer was warned; and the overseer, after being warned, informed the defendant of the fact, who thereupon directed the overseer not to send the slaves to work on the road. There is no authority for this proceeding, unless it can be sustained by the Code. It cannot be thus sustained. When the overseer is lawfully warned, the failure to send the slaves is his default, and not that of the employer. The fact that the overseer, after being warned, informed the employer of it, and that the employer thereupon directed him not to send the slaves to work on the road, cannot make the employer liable for the default, when he has not been warned in the mode prescribed by section 1166 of the Code.—See, also, Code, § 1169; Keenan v. Comm'rs' Court of Dallas, 26 Ala. 568; Connolly v. Ala. & Tenn. R. R. Co., 29 Ala. R. 373; Nowlin v. McCalley, 31 Ala. 678; Bettis v. Taylor, 8 Porter, 564.

For the error in refusing the charge asked by the defendant, the judgment of the circuit court is reversed, and the cause remanded.

MORRIS *vs.* LEWIS' EXECUTOR.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF CONTRACT.]

1. *Sufficiency of consideration.*—An agreement between an infant's father and grand-father, by which the former delivered to the latter certain slaves belonging to the infant, upon the promise of the latter to keep them for the infant, to provide for her, and to give her, as the representative of her deceased mother, a child's portion in the distribution of his estate, constitutes the grand-father a mere depository of the slaves for the benefit of the infant, and is not supported by a valuable consideration.
2. *Voluntary agreement not specifically executed.*—A court of equity will not, as in favor of a mere volunteer, even though he be the child of the promisor, compel the specific performance of a voluntary executory contract.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Leonora P. Morris, an infant suing by her next friend, against the executrix of Pearce A. Lewis, deceased, who was the complainant's grand-father; and sought the specific execution of a contract, entered into between said Lewis and the complainant's father, the material stipulations of which, as alleged in the bill, were these: In 1843, shortly after the death of the complainant's mother, who was a daughter of said Lewis, (complainant being her only surviving child,) "said Lewis proposed to complainant's father, that if he would relinquish back to him the possession of a slave, named Malinda, (who had been given by said Lewis to complainant,) and would let him have another family of slaves, about five in number, belonging to complainant, he would keep them for complainant, and provide for her, and that she should represent her mother in the distribution of his estate, and have a child's part of it." The bill alleged, that the complainant's father accepted this proposition, and delivered the possession of the slaves to Lewis, who, after retaining them for several years, finally disposed of them as his own property; and that said Lewis died in 1852, leaving a last will and testament duly executed,

which was admitted to probate after his death, and which excluded the complainant almost entirely from any participation in his estate.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, for want of equity; and his decree is now assigned as error.

PARSONS & J. WHITE, and CLOPTON & LIGON, for the appellant, contended, that the bill showed a sufficient legal consideration to support the contract sought to be enforced; that that consideration consisted of the benefit accruing to the promisor from the possession of the slaves without liability to account, and the consequent injury to the complainant from the loss of the services of the slaves. They cited to this point the following authorities: Parsons on Contracts, 357, and cases cited in note c; Addison on Contracts, 11, and cases cited in note 1; Gurvin v. Cromartie, 11 Iredell's Law Rep. 179; Mosby v. Leeds, 3 Call, 380; Burnet v. Bisco, 4 Johns. 234; Warnock v. Hughes, 14 Ala. 156; Erwin v. Erwin, 25 Ala. 241; McKeen & Bro. v. Harwood, 15 Ala. 797; Brooks v. Ball, 18 Johns. 337; Pillans v. Microp, 3 Burr. 1666; Train v. Gold, 5 Pick. 380; Violet v. Patton, 5 Cranch, 142; Clark v. Sigourney, 17 Conn. 571; Austyn v. McLure, 4 Dallas, 226; Adams and Wife v. Adams, 26 Ala. 277; Gray and Wife v. Executor of Jones, 4 Dess. 185; Allison v. Congleton, Litt. Sel. Cas. 30; Lemaster v. Burckhart, 2 Bibb, 30.

JAS. E. BELSER, *contra*, cited Kirksey & Jones, 8 Ala. 131; Forward v. Armistead, 12 Ala. 124; Evans v. Battle, 19 Ala. 398; Pinckard v. Pinckard, 23 Ala. 649; Stafford v. Bartholomew, 2 Carter, 153.

WALKER, J.—Upon the two propositions, that the agreement alleged in the bill was altogether voluntary, and that such agreement will not be executed, the chancellor based the conclusion, that the bill was wanting in equity, and dismissed it. We proceed to give the reasons, which induce us to adopt those two propositions, and to concur with the chancellor in his conclusion.

The averments of the bill disclose no consideration for the agreement of Lewis to give the complainant a child's part of his estate, unless a consideration is indicated in the proposition made by Lewis, the grand-father, which, being accepted, became the exponent of the terms of the agreement. If that proposition indicates any valuable consideration, it consists of the fact, that the negroes were, in pursuance to the terms of the proposition, delivered to Lewis, to be kept by him for the complainant.

In ascertaining whether the delivery of the slaves to Lewis, to be kept by him for the complainant, was a valuable consideration for the agreement above specified, it is necessary to inquire what rights or benefits such a bailment conferred upon the bailee.

The bailment of the slaves to Lewis, to be kept without compensation for the complainant, is very like a deposit, if not identical with it. A *depositum* is defined to be, "a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor;" and it is an essential characteristic of the contract, that the keeping shall be gratuitous.—*Coggs v. Barnard*, 2 Lord Raymond, 909; S. C., 1 Smith's L. C. 82; *Edwards on Bail*. § 47; *Story on Bail*. § 41. The depositary is a gratuitous bailee, and he is bound to account for any profits which may be derived from the property bailed.—*Edwards on Bailments*, 89-70; *Story on Bailments*, § 99. As the contract of Lewis was to keep the slaves for the complainant, and no benefit or profit to him was provided, and the terms of the agreement were strictly analogous to the implied agreement of a depositary, we conclude that Lewis, by his contract, took no benefit, and could derive no profit. There was, therefore, no consideration of benefit to Lewis to support the promise which the bill seeks to enforce. The argument that Lewis was entitled to all the benefit and profit resulting from the possession of the slaves is neither supported by the terms of the agreement, nor by the law.

No consideration of detriment sustained by the complainant is either averred in the bill, or deducible from its allegations.

It is true that the trust and confidence reposed by the bailor in the gratuitous bailee is regarded as a sufficient consideration to support the obligation, which the law implies, that the bailee will bestow the degree of care and diligence required by the law.—*Coggs v. Barnard*, *supra*; 1 Smith's Leading Cases, 96, note; Edwards on Bail. 58. The law deems the trust and confidence of the bailor, and the bailee's obligation of care and diligence, as reciprocal stipulations of the contract of bailment, like mutual promises, each constituting a consideration for the other. But we know of no principle or reason, which would authorize us to assert, that the law would imply that the trust and confidence of the bailor in a deposit was the consideration on which a stipulation additional to and other than the obligation of care and diligence was predicated.

As the law does not imply that the promise of Lewis to give his grand-daughter a child's part of the estate was based upon the trust and confidence of the bailment, we must look to the terms of the contract, and to the allegations of the bill, to see whether that promise was induced by such consideration. Upon doing so, we find that it is neither stated in the contract, nor alleged in the bill, that that promise was induced by such consideration. Nor can the inference, that the promise was based upon that consideration, be drawn from the circumstances alleged in the bill. The complainant was the only child of a deceased daughter of Lewis. Her slaves (she being an infant) were in her father's possession. The grandfather made an agreement, conferring no benefit upon him, by which he obtained possession of the slaves, and came under the obligation to keep them for his grand-daughter. He accompanied the proposition to take charge of the slaves with the assertion, that he would make the complainant an equal participant with his children in his estate. In the proposition he did not say, that the obtaining of the custody of the slaves induced him to make that declaration. Can we infer from these circumstances, if it were permissible to resort to inference in favor of the equity of the bill, that the consideration which induced

the promise was the possession of the slaves, as the complainant's bailee, without the right of deriving any benefit from the possession? A much more reasonable inference is, that Lewis was drawn by the ties of kindred and affection to take upon himself gratuitously the care of the property, and to make the promise in question.

The promise was, in our judgment, not the result of a valuable consideration. The cases of *Forward v. Armstead*, 12 Ala. 124, and *Kirksey v. Kirksey*, 8 Ala. 131, presented questions very like that which we have been considering; and in both the promise was held to have been gratuitous, although their facts afforded more ground for a different conclusion than do the facts of this case. To the former of those two cases we refer, for a correct statement of the principle governing the question here decided.

2. The promise of Lewis being voluntary and unexecuted, a court of chancery will not compel a performance of it. It is now well established, that the performance of an executory contract will not be enforced in favor of a mere volunteer, although the child of the promisor. *Evans v. Battle*, 19 Ala. 398; *Pinckard v. Pinckard*, 23 Ala. 649; 2 Story's Equity, 125, § 793; 2 Kent's Com. 466, note *a*.

The decree of the court below is affirmed.

RICE, C. J., not sitting.

BLACKWELL'S ADM'R vs. BLACKWELL'S DISTRIBUTEEES.

[BILL IN EQUITY FOR DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Election by distributees to ratify conversion by administrator.*—If an administrator converts the assets of the estate into other specific property, the distributees may, at their election, either charge him with the value of the converted assets, or pursue and claim the specific property obtained in exchange.

2. *Statute of limitations not available to executor or administrator.*—An executor or administrator cannot invoke the statute of limitations, to protect himself against the claim of distributees, unless he has denied the continuance of the trust, or set up a claim in his own right.
3. *Nor lapse of time, if trust is recognized.*—Ordinarily, the lapse of twenty years from the time when the administrator might be compelled to settle his administration, without the institution of proceedings to compel a settlement, raises the presumption of a settlement and the payment of the distributive interests; but this presumption is repelled by proof that the administrator holds, not in his own right, but in subordination to, and recognition of the rights of the distributees.
4. *Amendment of bill.*—Where the original bill was filed by the husband, as sole legatee of his deceased wife, to recover her distributive share of her father's estate; and the amended bill set up a marriage contract between him and his wife, which secured to him a life estate in her personal property, with remainder to her separate use,—*held*, that the amendment did not make a new case, since each of the titles asserted vested in the complainant the entire interest in the property sought to be recovered.
5. *Who may join as plaintiffs.*—Where a marriage contract secures to the husband a life estate in his wife's personal property, with remainder in fee to the separate use of the wife, who, on her death, makes her husband her sole legatee, the wife's personal representative may join with her surviving husband in a bill to recover her distributive share of her father's estate; and if no letters of administration on her estate have been granted at the time of the exhibition of the original bill by the husband, her administrator, when subsequently appointed, may be brought in as a co-plaintiff in an amended and supplemental bill.
6. *Parties to bill for distribution.*—To a bill which seeks the settlement and distribution of an intestate's estate, and which is filed by a distributee against the personal representative of the deceased administrator, the administrator of the intestate whose estate is sought to be distributed is a necessary party.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE original bill in this case was filed, on the 27th February, 1845, by William G. Vastbinder, in behalf of himself and all the other distributees of the estate of Nathan Blackwell, deceased, or such of them as chose to make themselves parties and contribute to the expenses of the suit; and sought to compel a settlement of said estate by James Blackwell, as the administrator of Mrs. Priscilla Blackwell, deceased, who was the widow and administratrix of said Nathan, and the recovery of the distributive portion of said estate which the complainant claimed as the sole legatee of his deceased wife, who was

a daughter of said Nathan Blackwell. Nathan Blackwell died in 1807. His widow administered on his estate, and kept up the family relation until her death, which occurred in 1844. In 1841, the complainant intermarried with one of said Nathan's daughters, who, on her death, (at what time does not appear,) made him sole legatee under her will. The bill was several times amended, and bills of revivor and supplement were filed. The points made on the pleadings, as well as the material facts which involve the merits of the case, are fully presented in the opinion of the court. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainants; and his decree in that behalf, together with his several interlocutory decrees, is now assigned as error.

THOMAS WILLIAMS, for the appellant.

PEGUES & DAWSON, *contra*.

STONE, J.—Our first impression was to dismiss the bill in this case, on account of the staleness of the demand. Looking more closely into the record, we think that position indefensible. True, near forty years elapsed between the qualification of Mrs. Priscilla Blackwell as administratrix, and the exhibition of the original bill. True, the property which is ordered to be distributed under the chancellor's decree, was purchased about fifteen years after the death of Nathan Blackwell, the intestate. Under these circumstances, if they stood alone, we would feel bound by our former decisions to hold that this claim could not be maintained.—See *Rhodes v. Turner*, 21 Ala. 210; *Barnett v. Tarrance*, 23 Ala. 463; *McArthur v. Carrie*, 32 Ala. 75.

These facts, however, do not stand alone. The proof tends strongly to show, that the slaves Rose and Polly, from whom the other slaves in controversy have descended, were purchased mainly, if not entirely, with means derived from the stock of cattle left by Nathan Blackwell at the time of his death. This, however, would not take the case out of the operation of the principle above asserted.

The proof in this record further shows, that Mrs. Blackwell and most of her children lived together as one family, after the death of Nathan Blackwell, for a period of between thirty and forty years; that all labored for the promotion of the common interest, and for the common support of the family; and that the increase of the property was aided materially by such common labor, and by a system of rigid economy which all seem to have observed. On these facts, if they stood unexplained, we would feel it our duty to hold, that Mrs. Priscilla Blackwell and her children held these slaves as tenants in common. If these were the only facts, possibly no relief could be obtained under the pleadings in this record, because of a variance between the allegations and the proof.—*Lockhart v. Cameron*, 29 Ala. 355; *Williams v. Barnes*, 28 Ala. 613.

But there is another feature of this record which must exert an influence in this connection. The sons of Mrs. Blackwell, who might assert some claim to these slaves under the principle last considered, and who lived with her up to the time of her death, have not asserted that claim; and after her death, they have conceded that the slaves are the property of her estate. In fact, it does not appear that they ever did set up any claim to this property in their own right, or that they have ever preferred any claim for the labor and services bestowed by them, either against their mother in her own right, or as the representative of their father's estate. According, then, to their concessions, this property has all the time been owned by their mother.

On the other hand, the bill avers, and the proof shows, that Mrs. Priscilla Blackwell has not claimed this property in her own right. After the marriage of her daughter Sarah to Mr. Vastbinder, in 1841, she spoke of these slaves as belonging to her husband, Nathan Blackwell's estate, and expressed a wish that they should be divided among her children. She expressly distinguished between these slaves and other property confessedly hers.

Under the circumstances disclosed in this record, we think certain well ascertained and defined legal princi-

ples demonstrate the right of Nathan Blackwell's distributees to have distribution of the slaves Rose and Polly and their increase, subject to the contingency and qualification after stated.

1. Where administrators convert the property of the estate into other specific and traceable effects, the distributees may charge them with the value of the converted property, or may elect to claim and pursue the property for which it has been exchanged.—*Kavanaugh v. Thompson*, 16 Ala. 817.

2. Trustees, such as executors and administrators, can not invoke the statute of limitations, to protect their possessions against the claim of distributees, unless they have denied the continuance of the trust, or set up claim in their own right.—*Angell on Lim.* §§ 168 to 174.

3. Although, after the lapse of twenty years from the time when Mrs. Blackwell should have settled her administration, we would, under ordinary circumstances, presume a settlement and payment of the distributive interests; yet, when the trustee holds, not in his own right, but in subordination to, and recognition of the rights of the *cestui que trust*, this presumption from mere lapse of time is repelled, and the bar is not perfected.—*McArthur v. Carrie*, 32 Ala., and authorities cited; *Milton v. Haden*, 32 Ala. 30; *Cholmondely v. Clinton*, 2 Jacob & Walker, 1; *Angell on Limitations*, § 164.

Connecting the fact that the stock of cattle left by Nathan Blackwell furnished the means, either in whole or in part, with which the slaves Rose and Polly were purchased, with the manner and character of Mrs. Blackwell's holding, and with her admissions made shortly before her death, and shortly before this bill was filed, this claim is relieved of the imputation of staleness. *Kimball v. Ives*, 27 Ver. 430.

It may become a question in the farther prosecution of this case, to what extent the effects of the estate of Nathan Blackwell entered into the purchase of the slaves Rose and Polly. Also, whether the trustee has blended the trust effects with her private funds, and the effect of such blending. We leave these open for the action of the court

below, without intimating at present any opinion whether the entire property in them, or only a partial interest, should be distributed. The chancellor, aided or not by a reference as he may elect, will be enabled to settle these questions more satisfactorily than we now can do.

This case, in its preparation, has had an eventful history. Six or seven amendments, supplements, and revivors, have been filed. We do not propose in this place to give their details. The rule is, that all amendments which are properly allowed, take effect, so far as the equity of the bill is concerned, as of the date of the original bill. Three questions are raised on the amendments, which we propose to consider.

1. Mr. Vastbinder filed the original bill in his own name alone, claiming the distributive interest of Mrs. Vastbinder in Nathan Blackwell's estate, under and by virtue of the provisions of her will, which constituted him her sole legatee. The original bill avers, that by a marriage contract, the property of Mrs. Vastbinder was secured to her separate use and enjoyment. The will had been proved and established, but it does not appear that her executor or any other person had qualified as her personal representative. In the original bill, no attempt was made to set forth the provisions of the marriage contract, further than is above stated.

An amended bill was subsequently filed, which exhibited the marriage contract. By its provisions, a life estate in the personal property of Mrs. Vastbinder is secured to her husband, and a separate estate in the remainder to her.—See *Pollard v. Merrill*, 15 Ala. 169. It is here contended, that this amendment was improperly allowed, because its effect was to make a new case. In this connection, we feel it our duty to state, that in one of the amended bills it is averred, that Mrs. Vastbinder, at the time of her death, owed no debts; and no issue has been formed on this averment.

The only difference between the right which Mr. Vastbinder asserts in his original bill, and that which he presents in his amended bill, consists in the different channels through which the interest accrues to him. Each state of

case gives him the entire interest; the former, as sole legatee of his wife's unincumbered distributive interest in Nathan Blackwell's estate; the latter, as owner of a life estate under the marriage contract, and the remainder as sole legatee under his wife's will.

In *Ingraham v. Foster*, 31 Ala. 528, we sanctioned an amendment which departed from the original bill in a particular more important than this. We, in that case, employed the following language: "To make an amendment improper, it is not enough that there be a mere inconsistency, or repugnancy of allegation. There must be an inconsistency, or repugnancy, in the purposes of the bill, as contradistinguished from a modification of the relief. One of the purposes of a chancery amendment is to correct an erroneous statement of the facts." We hold, that the amendment in this case did not make a new case. See, also, *Larkins v. Biddle*, 21 Ala. 252.

2. The original bill was filed in the name of Mr. Vastbinder alone. A supplemental bill brought in the personal representative of Mrs. Vastbinder as co-complainant. It is contended here, that Mr. Vastbinder had no such interest in the distributive share of Mrs. Vastbinder as authorized him to unite with her personal representative in a bill for its recovery.

We might content ourselves, in answer to this objection, with simply stating that, under the marriage contract, Mr. Vastbinder has a valuable interest, and the personal representative of Mrs. Vastbinder has also an interest. Both are interested in the property to be recovered, although their interests are not co-extensive. This renders them proper, if not necessary parties.—1 Dan. Ch. Pr. 272.

There is at least one adjudged case which goes further, and holds that, even if Mr. Vastbinder had no other interest than as legatee of Mrs. Vastbinder, he might unite with her personal representative in a chancery suit for the recovery of her distributive interest; and this would furnish no error of which the defendants could take advantage.—*Rhodes v. Warburton*, 6 Sim. (9 Eng. Ch. Rep.)

617; Story's Equity Pl. § 510; 1 Dan. Ch. Pr. 251. We hold, there was no misjoinder of complainants.

3. As Mrs. Vastbinder had no personal representative at the time the original bill was filed, and as such personal representative is a necessary party to this suit, it may be contended, that it was irregular to make the executor, who afterwards qualified, a co-complainant; and that this irregularity vitiates the complainant's bill. In a case involving this precise question, the amendment was held regular; the court remarking, that "the grant of letters of administration related to the time of the death, like the case where an executor, before his proving the will, brings a bill; yet, his subsequent proving the will makes such bill a good one."—*Humphreys v. Humphreys*, 3 P. Wms. 349; 1 Dan. Ch. Pr. 460–1. This amendment was properly allowed.

The slaves Rose and Polly, and their increase, still remain in specie. According to the principles above settled, they are, either in whole or in part, the property of the estate of Nathan Blackwell, deceased. An inquiry may become necessary, to determine whether the entire property, or only an interest in it, belongs to the estate of Nathan Blackwell; and if only a partial interest, to what extent that interest goes. On the trial of that issue, and the settlement of Mr. Blackwell's estate, there should be some one to represent that estate. Since the death of Mrs. Priscilla Blackwell, there has been no administrator of said Nathan's estate. It has been settled in this State, that in such case, it is indispensable that there should be an administrator of the estate of which distribution is claimed, and that such administrator shall be made a party to the suit. This principle rests on solid reasons, and is well supported by authority.—*Gardner v. Gantt*, 19 Ala. 666; *Robinson v. Robinson*, 11 Ala. 947; *Logan v. Fairlie*, 2 Sim. & Stu. 284; *Alexander v. Stewart*, 8 Gill & Johns. 226; *Moor v. Blagrove*, 1 Cases in Chancery, 277; 1 Dan. Ch. Pr. 253; Story's Eq. Pl. § 172.

For the errors above pointed out, the decree of the chancellor must be reversed, and the cause remanded. The complainants can apply for leave to perfect their

pleadings, after the proper court shall have appointed an administrator *de bonis non* to the estate of Nathan Blackwell, deceased.—Bloodgood v. Hartley, 16 Ala. 233. Let the appellees pay the costs of this appeal, to be paid out of the assets of the estates they severally represent.

COTHRAN vs. MCCOY'S HEIRS.

[BILL IN EQUITY TO ESTABLISH IMPLIED TRUST.]

1. *Jurisdiction of orphans' court to sell real estate of decedent.*—The orphans' court has no jurisdiction to order the sale of land, to which the decedent had a pre-emption claim at the time of his death, when it appears that he died before perfecting his claim, and that his administrator afterwards obtained a certificate of entry in his name, by the payment of money advanced by third persons, under a contract with the administrator that the land should be sold under an order of court for their reimbursement, the decedent's estate being insolvent.
2. *Validity of contract contrary to policy of the pre-emption laws.*—A contract between the administrator of an insolvent estate and another person, to the effect that the latter should advance the money necessary to enable the former to enter a tract of land, to which his intestate had a pre-emption claim at the time of his death; that the administrator should take a certificate of entry in the name of his intestate, and should then have the land sold under an order of the orphans' court; and that the other party should become the purchaser at the sale, and should deduct from his bid the amount of money thus advanced by him to make the entry,—is contrary to the policy of the pre-emption laws, and consequently void.
3. *Equitable relief in aid of illegal contract.*—Equity will not lend its aid to enforce rights arising out of an illegal contract, either by establishing an implied trust, or by decreeing the restitution of money paid out in execution of such contract.

APPEAL from the Chancery Court of Cherokee.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by David Cothran, the appellant, against the heirs and administrator of William McCoy, deceased, and sought to establish an implied trust in a certain quarter-section of land, to which the said William

McCoy had a pre-emption claim at the time of his death, and which was afterwards entered in his name by his administrator, with money advanced to him for that purpose by said Cothran and one John Lay, who had married a daughter of the intestate. The contract between the parties, under which said money was advanced by Lay and Cothran, and the other facts on which the complainant based his right to relief, are stated in the opinion of the court. The only prayer of the bill was "for such relief as the nature and circumstances of the case may require." On final hearing, on pleading and proof, the chancellor dismissed the bill, but without prejudice to the complainant's right to proceed, either at law or in equity as he might be advised, to recover the money which he had advanced or paid out in the entry and purchase of the lands; and his decree is now assigned as error by the complainant.

J. J. WOODWARD, for the appellant.

M. J. TURNLEY, *contra*.

RICE, C. J.—From the statements of the complainant's bill it appears, that as to the quarter-section of land therein described, William McCoy was entitled to claim the benefit of the pre-emption laws, but died before consummating his claim; that his administrator did not have the money belonging to the estate, with which to enter the said land; that the estate was insolvent; that it was agreed between the administrator, John Lay and the complainant, that complainant should advance one hundred dollars, and said John Lay should advance one hundred dollars, and each should pay the sum so advanced into the land-office for the purpose of paying for said land, and that the administrator should take the certificate in the name of his intestate, and should then expose the land to sale, by order of the orphans' court, and "the said Lay or complainant should buy in the same; and the purchaser should repay to the other the amount of one hundred dollars, so as aforesaid advanced, and then pay the bid, after deducting the sum of two hundred dollars, so as

aforesaid advanced to pay for the entry of said land ;" that in pursuance of this agreement, and in fulfillment thereof, and by the use of the money advanced as aforesaid, the administrator "did enter the said land *under the pre-emption law*, and obtained the issuance of a certificate of entry to and in the name of the deceased, William McCoy," and afterwards applied for and obtained from the orphans' court of Cherokee county, in which the land was situated, an order to sell the land, and under said order sold it, and at that sale complainant became the purchaser, at the bid or price of four hundred dollars, and then went into possession of the land ; that afterwards a certificate of entry of said land was issued, to and in the name of the heirs of the said William McCoy, deceased, by the procurement of the said heirs, under and by virtue of the payment of the one hundred dollars of the money of complainant, and of the one hundred dollars of the money of said John Lay, made in the land-office as aforesaid, without the payment of any thing by the heirs ; that the heirs then procured a patent to themselves for the land, and brought an action for its recovery against complainant, and recovered it, and ejected the complainant from its possession ; and that complainant has paid, in the mode specified in his bill, the four hundred dollars bid by him for said land at the sale made under the order of the orphans' court. The relief sought by the complainant is, that the court of chancery decree to him the land, or the whole or part of the money he has paid out for it as aforesaid.

As William McCoy was entitled to claim the benefit of the pre-emption laws, as to the land described in the bill, but died before consummating his claim, the entry of the land should have been made in favor of "the heirs" of said William McCoy—5 U. S. Statutes at large, 620, § 2. But, if the patent had issued to him after his death, the title to the land would have enured to, and become vested in his heirs, under the act of congress approved May 20, 1836.—Public Land Laws, 1 vol., 540. The land was not subject to sale under the order of the orphans' court, and the sale under such order was a nullity—Johnson v. Col-

lins, 12 Ala. R. 322; Pettit v. Pettit, at last term. The contract between the complainant, Lay and the administrator, was made before the entry was made in the land-office, and was, in substance, evidently a contract for the sale of the pre-emption; for, if it be upheld, it deprives the heirs of the pre-emption right secured to them by law. The mode the parties adopted to carry that contract into execution, is of no consequence. The illegal contract was none the less illegal, because the orphans' court voluntarily became, or by imposition was made, the instrument of carrying it into effect.—Rogers v. Brent, 5 Gilman, 576. And there can be no doubt, that the contract for the sale of the pre-emption, made as it was before the entry in the land-office, was in contravention of the provisions and policy of the pre-emption laws, and was consequently void; and that the subsequent proceedings in the orphans' court, and under color of its order of sale, had as they were in *the known fulfillment and execution* of the illegal contract, and at the instance of one or more of the parties thereto, were also void.—Hudson v. Milner, 12 Ala. R. 667; Tenison v. Martin, 13 Ala. 21.

It is a party to that illegal contract who is here applying for relief; and the relief he is seeking is either to get the land of the heirs, contrary to law, or to be absolved from the consequences of the position in which he placed himself by the illegal contract and his conduct in carrying it into execution. A court of equity cannot aid him; it leaves him where he has placed himself by his illegal agreement and his conduct in execution of it.—See May v. Moore, at this term, and authorities there cited.

Decree affirmed, at the costs of appellant.

Smoot v. Hart.

*Overruled by Underhill vs Balhoun
Dec T. 1879.*

SMOOT vs. HART.

[GARNISHMENT ON JUDGMENT.]

1. *Garnishment lies not against marshal of municipal corporation.*—A judgment creditor of a municipal corporation, having obtained a return of “no property” on an execution, may, (Code, § 2472,) by process of garnishment against the marshal, reach and subject the funds of the corporation in his hands, arising from taxes, fines and forfeitures.
2. *Affidavit for garnishment.*—When a garnishment is sued out under section 2472 of the Code, if the affidavit corresponds with the requirements of that prescribed by section 2471, it is sufficient.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. E. W. PETTUS.

THE appellant in this case, having obtained a judgment against the mayor and aldermen of the city of Wetumpka, on the 16th October, 1854, afterwards sued out a garnishment against Joseph B. Hart, as the debtor of said corporation; making oath, before the clerk of the circuit court of the county, “that said Joseph B. Hart is supposed to be indebted to, or have in his possession, or under his control, effects belonging to said defendant; and that said affiant believes that process of garnishment against said Hart is necessary to obtain satisfaction of said judgment.” The garnishee answered, “that he had in his hands, as marshal of the city of Wetumpka, at the time of the service of this garnishment, and has collected since that time from the taxes and fines due said city, the sum of six hundred and thirty-eight 80-100 dollars; that all of said money was collected by him, as marshal of said city, under the ordinance for the collection of taxes and the imposition of fines and forfeitures; that he is not indebted in any other way, as marshal, either by contract or otherwise; and that he has under his control no property, real or personal, belonging to said city.” On this answer, the garnishee moved to be discharged, and the plaintiff moved for judgment against him. On the hearing of these mo-

tions, "it was admitted that the money received by the garnishee was collected by him, as marshal of the city, under by-laws passed in accordance with powers conferred by the charter upon the mayor and aldermen of said city, and was in his hands as marshal; and that the charter of said city might be referred to by either party, both in the circuit and in the supreme court, as if fully set out in this bill of exceptions." The court granted the motion of the garnishee, and discharged him, rendering a judgment for costs against the plaintiff; and this ruling of the court, to which the plaintiff excepted, is now assigned as error.

N. S. GRAHAM, and PARSONS & J. WHITE, for appellant.
JOHN T. MORGAN, *contra*.

WALKER, J.—The sole question of this case is, whether the judgment creditor of the municipal corporation, having obtained a return of *nulla bona* on his execution, can by garnishment reach its funds, in the hands of its marshal, produced by taxation and the imposition of fines and forfeitures.

Section 2472 of the Code is in the following words: "A judgment creditor of an existing corporation, whose execution has been returned 'no property found,' his agent or attorney, upon making affidavit before the clerk that a certain person supposed to be indebted to the corporation, as stockholder or otherwise, is entitled to the process of garnishment, returnable forthwith if in term time, or to the next term if in vacation; and such proceedings must thereupon be had, as in cases of original attachments." This statute certainly authorizes the issuance of a garnishment against the debtor of a corporation.

In the Central Plank-Road Co. v. Sammons & Doty, 25 Ala. 380, the keeper of a toll-gate was held, as to funds received for toll, a debtor of the corporation by which he was employed, even before a demand had been made by the corporation. That decision is correct. The relation of debtor and creditor exists between the agent who receives the money of his principal, and the principal,

when the money is received; but the time of payment is fixed by the demand. The agent is not bound to pay until the demand is made, and, consequently, the right of suit by the principal is dependent upon the demand. An analogy is afforded by a promissory note, payable upon demand. The maker of such a note is, from its date, the debtor of the payee; but the time of payment and right of suit are postponed until the demand is made. In the case above-referred to, it was decided, upon satisfactory reasoning, that the demand by the principal of the agent is not an indispensable pre-requisite to the institution of the garnishment proceeding. No costs are imposed, and no loss sustained, by the agent, in consequence of the allowance of a garnishment proceeding without a demand. It would be otherwise, if the principal could sue his agent without affording him an opportunity to pay.

The marshal, who collected the money of the corporation in this case, became its debtor by the reception of the money; and, after demand made, an action of *indebitatus assumpsit* might have been maintained against him. May not a creditor of the corporation, upon the principle of the case of the Central Plank-Road Co. v. Sammons & Doty, prosecute the proceeding by garnishment against him? This question must certainly be answered in the affirmative, unless the fact that the marshal is an officer of a public corporation, clothed with governmental power, or the nature of his office, shall create a distinction.

The mere fact that the marshal is a public officer can authorize no exemption of him from liability to garnishment; for section 2521 expressly directs, that "money in the hands of an attorney-at-law, sheriff, or other officer, may be attached." The principle of public policy, upon which sheriffs were excepted from the operation of the garnishment law before the adoption of the Code, is not available in this case. The reason for that exception was, that money collected under execution by the sheriff was in the custody of the law, and that a garnishment could not relieve a sheriff from his official obligation to bring the money into court to abide its judgment as to the

appropriation of the money.—Zurcher v. Magee, 2 Ala. 253. The money here is collected by the marshal, under the authority of the municipal corporation, and the single duty devolves upon him of paying it over after its collection; and for that reason, the principle adopted in Zurcher v. Magee has no application in this case, if it can have in any case since the adoption of the Code.

The decision in Mayor, &c. v. Rowland, 26 Ala. 498, that a municipal corporation cannot by garnishment be made to pay to the creditor of one of its officers the accruing salary of such officer, does not control the question now before us. That decision is placed upon the ground, that a municipal corporation could not be sworn, and could not, "in the nature of things, personally appear in court;" that the officers of the corporation might be prevented from discharging their duties to the public, by the requisition that they should answer garnishments in the different courts throughout the State; and that a municipal corporation might be deprived of the services of a desired officer, if his salary could in advance be taken by garnishment. The second of the grounds upon which that decision is based, is the only one which has any application in this case. But that is not set down as a sufficient reason for the exemption of a corporation from garnishment, but as a cumulative argument in support of the conclusion attained by the court. While we admit, that the liability of the officer of the corporation to be summoned as a garnishee might, to some extent, interfere with the constant attention to his official duties, we are not willing to allow it as a sufficient reason for his exemption. The same principle would require us to relieve every man, charged with official duties, from liability to garnishment, even in his individual capacity, because peradventure it might, to some extent, interfere with his public duties. The legislature have clearly disregarded such policy, in subjecting to garnishment any "sheriff or other officer."

It is contended, that the marshal of the city of Wetumpka is the mere custodian of the funds of the city; that he is the depositary or keeper, *virtute officio*, of its

funds; that the money in his hands is really in the possession of the corporation; that he stands in the relation of a treasurer of a society, or a bank-officer. We do not decide, whether the money in his hands could be attached, if he stood in the supposed relation to the corporation and to the money. The decision cited by the counsel for the appellee, (*Neuer v. Fallon*, 18 Missouri, 277,) decides, that in such a case the money could not be reached by garnishment. It was admitted in the court below, as shown by the judgment entry, that the money was received and held by the garnishee as the city marshal. The charter of the city of Wetumpka (Pamphlet Acts of '38 and '39, page 44) does not constitute the marshal a treasurer, or make him the custodian of the funds of the city. On the contrary, it expressly authorizes the appointment of a treasurer. The garnishment is, therefore, not against one keeping the funds as a treasurer of the corporation, but against an officer who has collected them for the corporation, and who holds them subject to its demand or order; and he does not fall within the principle invoked by the counsel, but rather within the principle settled in the *Central Plank-Road Co. v. Sammons & Doty*.

We cannot yield our assent to the argument, that the money due to a municipal corporation shall be exempt from attachment, because it is charged with the discharge of public duties, and collects and holds its money as the means of accomplishing them. The argument would, if the principle asserted in it were carried out, lead to the allowance of a perfect immunity to the corporation from the compulsory payment of any debts. If process should be levied upon the property of a municipal corporation, it might as well be said that the property should not be sold, because it was a means of accomplishing the public duties of the corporation, as that its money should be exempt from attachment. It is true the power of taxation by the city of Wetumpka is restricted; but there is no prohibition, express or implied, to the appropriation of money, raised by taxation, or fines and forfeitures, to the payment of debts. We cannot distinguish against the obligation to pay the debt of the plaintiff, when compared with any

Ex parte Peterson.

public duty in the performance of which the money of the city could be used.

In *Tarver v. The Commissioners' Court*, 17 Ala. 527, it was decided, that a *mandamus* was the proper remedy to compel the commissioners' court to levy a tax authorized for the payment of a particular debt. Here the question is, not whether *mandamus* is the remedy to compel the city of Wetumpka to levy a tax for the purpose of raising money with which to pay off a debt, but whether money already in hand can be reached by garnishment. We cannot, therefore, perceive that the case of *Tarver v. The Commissioners' Court* is an authority for the position taken for the appellee, that the appellant's only remedy was by *mandamus*.

We find no satisfactory reason for exempting the defendant in this case from the operation of the garnishment law; and we decide, therefore, that the court erred in not rendering judgment against the garnishee upon his answer.

[2.] We entertain no doubt of the sufficiency of the affidavit in this case.—Code, §§ 2471, 2472.

The judgment of the court below is reversed, and the cause remanded.

RICE, C. J., not sitting.

EX PARTE PETERSON.

[APPLICATION FOR PROHIBITION.]

1. *When prohibition lies to circuit judge.*—The supreme court will not award a prohibition, to restrain proceedings under a rule *nisi* for a *mandamus*, issued by circuit judge to the probate court, because the statute (Code, § 629) authorizes circuit judges to grant writs of *mandamus*; but the writ will be awarded to vacate and annul an order for a *supersedeas*, granted by such circuit judge, to restrain proceedings under an execution issued on a decree of the probate court until such application for a *mandamus* could be heard in the circuit court.

2. *Judicial notice of judicial officers.*—The supreme court will take judicial notice of the resignation of a circuit judge.

APPLICATION for a prohibition, or other remedial process, to the Hon. WM. M. BROOKS, late judge of the first judicial circuit, to restrain further proceedings under certain orders of said judge alleged to be unauthorized. The petitioners were Sarah Peterson, Tabitha Peterson, Thos. Peterson, and Lawrence Peterson, minors suing by their next friend; and the facts on which they predicated their right to the relief sought, as shown by their petition and the accompanying transcripts, are as follows: On the 3d May, 1858, the probate court of Dallas rendered four separate decrees, one in favor of each of the petitioners, against one Tilman Watson, their guardian, on final settlement of his guardianship. Executions were duly issued on these decrees, against said guardian and the sureties on his bond, James Davis and Daniel Davis, and were levied by the sheriff of Butler on certain slaves belonging to the said sureties. On the 15th July, 1858, the said James and Daniel Davis applied to the Hon. William M. Brooks, then judge of the first judicial circuit, which does not include said county of Dallas, for a *mandamus* and *supersedeas*, to restrain further proceedings under said executions, and to quash and annul them and the decrees on which they were issued; alleging that said decrees, for reasons set forth in their petition, were wholly unauthorized and void. In accordance with the prayer of said petition, Judge Brooks granted a rule *nisi* to the probate judge of Dallas, to show cause why a *mandamus* should not issue to quash and vacate said executions and decrees; and ordered said probate judge to issue a *supersedeas*, to restrain further proceedings under said executions. To vacate these orders, and to restrain further proceedings under them, is the object of the application to this court.

GEO. W. GAYLE, for the petitioners.

JNO. D. F. WILLIAMS, *contra*.

STONE, J.—In *Ex parte* Greene and Graham, 29 Ala. 52, 58, we said, the writ of prohibition is “never to be resorted to, except in cases of usurpation or abuse of power, and not then, unless other remedies are ineffectual to meet the exigencies of the case.” We said further, “our power under this application is confined to the inquiry, has the inferior tribunal assumed to act upon a matter, or upon the rights of a party, that could not be determined, or proceeded against in that forum.”—See, also, *Ex parte* Morgan Smith, 23 Ala. 94; *Ex parte* Walker, 25 Ala. 81.

We will first consider the power of this court to prohibit Hon. Wm. M. Brooks, late judge of the first judicial circuit, from proceeding in the matter of *mandamus* to the probate court of Dallas.

In the case *Ex parte* Greene and Graham, *supra*, we further added, “The bill may abound in imperfections; may be fatally wanting in necessary averments, or may be instituted in a district in which the defendants are not liable to be sued. These, if they exist, are proper matters of defense, and cannot be reached by this extraordinary process.” The plain import of this principle is, that if the inferior tribunal have jurisdiction to issue a writ, or make an order, such as is complained of—there, a mistaken exercise of the jurisdiction, or a misapplication of this acknowledged jurisdiction, even though the case made by the petition is fatally defective, will not justify a resort to the extraordinary process of prohibition.

Under the Code, (§ 629, subd. 1,) circuit judges have authority to grant writs of *mandamus*. The rule to show cause why a *mandamus* should not issue in this case was granted by a circuit judge, and we think the case comes within the above principle. We are not able to perceive a distinction between the legal question we are considering, and the case of an injunction granted by an officer who is authorized by law to grant injunctions. The bill may be fatally defective—may contain no grounds for equitable relief; yet this court would not arrest the proceedings before the chancellor by writ of prohibition. On the other hand, if the injunction were granted by one

having no authority to make the order, we would award a prohibition, notwithstanding the bill might present a state of facts which called for equitable interposition.

Ex parte Morgan Smith, supra.

For the reasons above stated, we decline to award the writ of prohibition, to arrest the proceedings under the rule to show cause why a *mandamus* should not issue. If that rule was improperly issued, the circuit court of Dallas can correct the error; and if it fail to do so, the case can be brought to this court by appeal.

The *supersedeas* granted by the circuit judge in this case stands on a different principle. That order was made, not with a view to permanent relief in the circuit court through that process. It is not even returnable to that court. Its purpose seems to have been to suspend proceedings under the decrees of the probate court of Dallas, until the application for *mandamus* could be heard in the circuit court. It is, in its effect, very like an interlocutory injunction. Whilst all courts have the power to prevent abuse and undue oppression under their own process, we know of no statute or rule of law which authorizes judges of the circuit court, in the form pursued in this case, to suspend or supersede executions from the probate court. We think, in this matter, the circuit judge acted entirely without his jurisdiction; and to restrain that unauthorized exercise of authority, we award the writ of prohibition.—3 Bla. Com. (side page) 112.

The writ of prohibition, says Mr. Blackstone, is directed to the judge and parties of a suit in an inferior court. Com. vol. 2, p. 112; *Ex parte Greene and Graham, supra.* In the case of *Ex parte Smith*, 23 Ala. 94, 121, this court ordered Chancellor Lesesne, not only to *cease from the prosecution* of said proceedings, but went further, and commanded and enjoined him, *without delay, to revoke and annul, or cause to be revoked and annulled the order made, &c.*

In the present case, it is judicially known to us that since Judge Brooks made the order for a *supersedeas*, his office as circuit judge has ceased by his resignation. The order was made by him as circuit judge, and not by a

circuit court. The order being made by him as circuit judge, power or jurisdiction over the subject did not pass to his successor, nor to any other circuit judge. The case is now pending, not before him, but in another tribunal. Nor should we assume to issue a writ of prohibition in this case, to the probate court of Dallas. If that tribunal had voluntarily suspended its own execution, such order could at most have been irregular, because that court has jurisdiction over its own process, to prevent abuse or undue oppression under it. Obeying, as it did, a circuit judge in the matter of the *supersedeas*, this could not oust its jurisdiction, or convert the order into a usurpation by that tribunal. The abuse of power was by the circuit judge. The order of the circuit judge being vacated, however, the powers of the probate court to proceed under its own decrees will stand restored to the state they were in before the order for *supersedeas* was granted.

This court, accommodating its relief to the exigencies of this case, doth hereby order, adjudge, and decree, that the said parties, James Davis and Daniel Davis, cease from the prosecution of said writ of *supersedeas*, so granted by Hon. Wm. M. Brooks. It is further ordered and adjudged, that the said order for *supersedeas* be vacated, annulled, and held for naught.

Let the said James Davis and Daniel Davis pay the costs of this proceeding.

PARMER vs. ANDERSON.

[SLANDER FOR WORDS SPOKEN CHARGING LARCENY.]

1. *Relevancy of words spoken after commencement of suit.*—In an action for verbal slander, the repetition of the slanderous words charged, or the speaking of other words which are of similar import, or which expressly refer to the words charged, after the commencement of the suit, is admissible evidence for the plaintiff, as tending to show malice; *secus*, as to other words spoken after suit brought.

2. *When action lies.*—An action does not lie for the speaking of words, which, though actionable in themselves, are shown to have related to a known transaction, not amounting to the charge which the words would otherwise import; but this principle does not extend to cases in which the words, though spoken in reference to a transaction which did not amount to the charge otherwise imported by them, were not known to the hearers to be spoken in reference to that transaction.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. S. D. HALE.

THIS action was brought by Seaborn Anderson, against William Parmer, to recover damages for the false and malicious speaking by the defendant, of and concerning the plaintiff, of certain words alleged to be “in substance as follows: ‘Seaborn Anderson has stolen three of my negroes, and has them locked up in his house;’ ‘Seaborn Anderson stole my negroes, and I intend to prosecute him, and put him in the penitentiary for ten years;’ ‘Seaborn Anderson has stolen my negroes, and they are in his house now, and I intend to take out a search-warrant and take them out;’ ‘He has stolen my negroes, and has got them locked up in his house, and I mean to put him in the penitentiary for it;’ ‘Seaborn Anderson has stolen three of my negroes.’” The defendant pleaded not guilty, “in short by consent;” and a trial was had, on issue joined on this plea, at the May term, 1857.

On the trial, as appears from the bill of exceptions, the plaintiff introduced two witnesses, Anderson and Boze-man by name, who testified to the speaking by the defendant, on Sunday morning about Christmas, 1854, in the plaintiff’s own yard, of the words charged; the former witness stating that the words spoken were, “He has three of my negroes stolen and locked up in his house, and I will put him in the penitentiary before to-morrow night for stealing;” the latter, that the words were, “He has stolen three of my negroes, and I will put him in the penitentiary for it.” It appeared that the negroes, to which defendant’s words related, were claimed by him under a deed from one Mrs. Moore, who was the aunt of his wife, as also of the plaintiff; that the title to them had been previously litigated, both at law and in equity, be-

tween Mrs. Moore and one Elijah Anderson, who was her brother; that the consideration recited in her deed to the defendant, which was introduced as evidence by the defendant, was his assumpsit and payment of the costs and attorney's fees incurred by her in these suits, and his promise to support and maintain her during her life; that Mrs. Moore had resided with the defendant for about eighteen months before the execution of this deed, which was dated the 15th September, 1854, but left his house a few months afterwards, and a few days before Christmas, 1854, and went to the plaintiff's house; that the negroes had been in the defendant's possession, and were on his plantation until the Saturday night before Christmas, 1854; that when discovered to be missing on the next morning, the defendant tracked them through the fields in the direction of the plaintiff's house, and found that other persons, on horseback, were in company with them; that he then returned, and requested several persons to go with him to the plaintiff's house, as witnesses of what might be said and done; that the plaintiff was absent when the party reached his house, but his wife and Mrs. Moore were there; that the defendant and one of his witnesses, on looking through a crack in one room of the house which was locked, saw the negroes there; that the defendant then requested the plaintiff's wife and Mrs. Moore to let him have the negroes, but they refused to do so; and that the slanderous words charged in the complaint, which, however, were differently stated by the several witnesses, were then and there spoken under the circumstances detailed.

The defendant introduced as a witness one Mastin, then the sheriff of Montgomery county, who testified, that the bill of costs mentioned in Mrs. Moore's deed to the defendant, "came into his hands for collection by execution; that he received the amount of said costs, which was \$305, from one Hughes, his deputy; and that Hughes, when paying him the money, *said that he received said money from the defendant.*" On the objection of the plaintiff, the court excluded from the jury that portion of

this testimony which is italicized; and the defendant excepted.

"The plaintiff, by way of rebuttal, introduced one Walton as a witness, who testified, that the defendant, on the evening of the 21st May, 1857, (which was the day before the trial in this cause was had,) in the streets of Montgomery, stated to him, '*that the plaintiff was a mean dog, and that all the Anderson family had sworn d—n lies against him.*' In offering this evidence, the plaintiff stated, that its object was to show malice in the defendant when he spoke the said words about Christmas, 1854." The defendant objected to this evidence, "on the ground that it was illegal and irrelevant;" and reserved an exception to the overruling of his objection.

The plaintiff then offered to prove by said Walton, "that Pickens Parmer, who was the defendant's son, came up to witness, in the presence of said defendant, in the streets of Montgomery, on the night of the day preceding this trial, and said to witness, that the plaintiff in this action had brought witnesses here to impeach his testimony, which, he (Pickens) said, was to be given before the jury in this case; that witness replied, 'No, I reckon not;' that said Pickens repeated, 'It is so; and that the defendant then said to Pickens, '*Take your knife, and cut his (plaintiff's) heart out—I am worth forty thousand dollars, and you shall not be hurt.*' In offering this evidence, the plaintiff stated, by his counsel, that its object was to show malice in the defendant when he spoke the said words about Christmas, 1854, which are above stated." The defendant objected to the admission of this evidence, "on the ground that it was illegal and irrelevant," and reserved an exception to the overruling of his objection.

There was other evidence in the cause, which, however, is immaterial to the points here presented for revision.

"The court charged the jury, among other things, that if they believed from the evidence that the plaintiff had feloniously taken the slaves from the defendant's premises, with a view to convert them to his own use, then he would be guilty of larceny; but, if the evidence satisfied them that he took said negroes from the defendant's premises,

asserting a *bona-fide* claim to them, either for himself or for Mrs. Moore, and without a felonious intent, then he would only be guilty of a trespass; and that if the words were spoken only in relation to a trespass thus committed by the plaintiff on the defendant, and not a larceny, then the plaintiff could not recover."

"The defendant asked the court to charge the jury, that if they believed from the evidence that the words complained of by the plaintiff were spoken by the defendant in reference to the taking away of the negroes from the defendant's premises in the night-time, and their being locked up next day at the plaintiff's house, and without any other motive or intent; and that these acts superinduced the speaking of the words by the defendant, and that without them the words would not have been spoken by him; and further, that the plaintiff did thus take them away and lock them up in his house, or aided and abetted in it, and, in so doing, was, under the instructions given by the court, guilty only of a trespass, and no larceny or criminal offense,—then the plaintiff could not recover, and their verdict must be for defendant."

The court refused to give this charge, and the defendant excepted; and he now assigns as error all the rulings of the court, as above stated, to which he reserved exceptions.

JAMES E. BELSER, and WATTS, JUDGE & JACKSON, for the appellant, cited the following authorities:

1. To show that the court erred in admitting the portions of Walton's testimony to which objection was made—Watson v. Moore, 2 Cushing, 133; Bodwell v. Swan, 3 Pick. 376; Miller v. Kerr, 2 McCord, 285; Tate v. Humphrey, 2 Camp. 73; Stuart v. Lovell, 2 Starkie, 63.

2. That the court erred in the refusal of the charge asked—Kirksey v. Fike, 29 Ala. 206; Wright v. Lindsay, 20 Ala. 428; Norton v. Ladd, 5 N. H. 203.

ELMORE & YANCEY, with whom was A. C. FELDER, *contra*, contended,—

1. That the testimony of Walton was competent evi-

dence, in rebuttal, as tending to show malice.—Long v. Rodgers, 19 Ala. Rep. 321; Teague v. Williams, 7 Ala. Rep. 844.

2. That the charge asked by the defendant asserted a broader proposition than was sanctioned by the authorities cited to sustain it.

RICE, C. J.—Without undertaking to comment upon the numerous cases relating to the admissibility, in an action of slander, of words spoken by the defendant after the commencement of the suit, we shall content ourselves with stating the conclusion upon the subject to which principle and authority have impelled us. A repetition of the slanderous words alleged in the complaint, or the speaking of words of similar import, or which expressly refer to those alleged in the complaint, after the commencement of the suit, is admissible. But they are admissible only for a defined purpose, that is, to show that the words charged in the complaint were spoken, *not heedlessly, but maliciously*. For that purpose, and to that extent, their admissibility rests upon satisfactory ground; because, if they are not, *per se*, “the evidence of a malicious heart brooding over its victim,” they certainly must be treated as circumstances which *naturally and reasonably tend* to prove malice in the speaking of the words alleged in the complaint, or from which it may *naturally and reasonably be inferred*.” They must, therefore, be held admissible, inasmuch as malice in the speaking of the words charged in the complaint is regarded as the gist of the action, or essential to a recovery by the plaintiff.

But words spoken after suit brought, which are not a repetition, either in letter or substance, of those charged in the complaint, which are not of similar import, and which do not clearly refer to them, are not admissible. Thus, words spoken after action brought, which amount to a distinct slander, in imputing to the plaintiff a crime different from that imputed by the words alleged in the complaint, and which do not refer to those words, ought not be received.—Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cushing, 133; Finnerty v. Tipper, 2 Camp.

75; Teague v. Williams, 7 Ala. R. 844; Ware v. Cartledge, 24 Ala. R. 622; 5 Phil. on Ev. (edition of 1849, by Van Cott,) 246, 247, and notes; Miller v. Kerr, 2 McCord, 285.

The words, as charged in the complaint in this case, impute to the plaintiff the crime of larceny—the stealing of slaves. Words, spoken after action brought, imputing to the plaintiff meanness and perjury, without any reference to the words charged in the complaint, are not admissible. The court below erred, therefore, in permitting the plaintiff to prove, by Walton, that on the day preceding the trial, the defendant said to the witness, “that the plaintiff was a mean dog, and that all the Anderson family had sworn damn lies against him.” From them the inference is not a reasonable or natural one, that he spoke the words charged in the complaint, with malice.—See Scott v. Cox, 20 Ala. R. 294; Brock v. The State, 26 Ala. R. 104.

The court erred, also, in admitting Walton to testify to what was said in the interview on the night preceding the trial, between the defendant, his son Pickens, and the witness. What was said by the defendant on that occasion, is evidence of *passion*; but, in law, *passion* is distinguished from *malice*.—The State v. Will, 1 Dev. & Batt. From what the father did say on that occasion, the inference is not authorized, that the words alleged in the complaint were spoken with malice.

[2.] There was no error in refusing the charge as asked by the defendant. That charge does not conform to the law as laid down in the authorities.—See Van Rensselaer v. Dole, 1 Johns. Cases, 279; Trabue v. Mays, 3 Dana, 138; Pegram v. Styron, 1 Bailey, 595; Norton v. Ladd, 5 New Hamp. R. 203; 1 Starkie on Slander, (edition of 1852, by Wendell,) 99, and notes; Kirksey v. Fike, 29 Ala. R. 206; Henry v. Power, 10 Mees. & W. 564; Hanklason v. Bilby, 16 Mees. & W. 442; Wright & Lindsay, 20 Ala. R. 428.

The foregoing authorities show it to be settled, that the defendant, in an action of slander, may show that the words related to a *known* transaction, not amounting to

the charge which the words would otherwise import. But that is not the proposition asserted in the charge which was asked by the defendant in the present case. See *Wright v. Lindsay*, and other cases, *supra*.

As the question in relation to the admissibility of the declaration of the deputy sheriff Hughes may not be presented in the same shape on another trial, and as we must reverse the judgment for the errors above pointed out, we shall not pass on it.—See *Harrison v. Harrison*, 9 Ala. Rep. 73.

Judgment reversed, and cause remanded.

MYERS' EXECUTORS *vs.* MYERS.

[ACTION BY LEGATEE AGAINST EXECUTORS FOR HIRE OF SLAVES.]

1. *Hire of slaves specifically bequeathed*.—If slaves, specifically bequeathed, are detained by the executor after they are due to the legatee, and profit thereby accrues to the estate by their labor or hiring, the legatee may recover their reasonable hire from the executor.
2. *Legacy held specific, and not demonstrative*.—A legacy of twenty negroes, "of the average value of all the negroes owned by" the testator, to his wife for life, with remainder over, followed by a bequest of "all the rest and residue of the negro slaves belonging" to him to his children, is neither a general, nor a demonstrative, but a specific legacy.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by Mrs. Georgiana Myers, against the executors of her deceased husband, Claiborne Myers, to recover the hire of twenty negroes which were bequeathed to the plaintiff by her said husband. It appeared from the evidence adduced on the trial, that the testator died on the 12th May, 1853, leaving his widow and seven children surviving him; that his will, hereinafter referred to, was admitted to probate in June, 1853; that he owned about one hundred and sixty slaves at the

time of his death, which were distributed and worked on his three plantations; that he had on hand in cash only about \$1,000, while his estate was indebted to about the amount of \$50,000; that the executors kept the estate together, under an order of the probate court, (for what length of time is not stated,) and worked all the slaves on the three plantations as had been done in the testator's life-time; that the twenty negroes bequeathed to the plaintiff were delivered to her by the executors on the 12th December, 1854; that she had never demanded them, nor had the executors previously assented to her legacy; and that the executors afterwards sold all the personalty, with twenty of the negroes, for the payment of the debts, the increase of the estate proving insufficient for that purpose. This action was brought to recover the hire of the plaintiff's said twenty slaves, up to the time when they were delivered to her by the executors; and the value of said hire was proved.

The only provisions of the testator's will, the construction of which is involved in the case, are the 2d and 5th clauses, which are in these words:

"2. I give, devise, and bequeath to my wife, Georgiana, the following property, real and personal, to-wit: all that tract or parcel of land, belonging to me, and lying in the county of Autauga, about one mile from Robinson's Springs, containing 408 acres, more or less, with the improvements and appurtenances thereto belonging, and all the other lands I may buy before my death, adjoining the above-mentioned tract; *twenty negroes, of the average value of all the slaves I may possess*; six mules, and ten milch cows, with their calves, to be selected by my executors from those on my plantation and belonging to me, and of the average value of the mules and milch cows owned by me; the carriage and pair of carriage-horses I may have at the time of my death; all the household and kitchen furniture, and silver plate, I may have at the time of my death; to have and to hold the said devised and bequeathed property, real and personal, and the natural increase of the female slaves, to my said wife Georgiana, to and for her use, during the term of her natural life; and at her

death, I give, devise, and bequeath the same to my children then living, and the issue of such of my children as are dead, to be equally divided between them—that is to say, each of any children then living to take one equal share, and the issue then alive of any deceased child to stand in the place of the parent, and take equally among them the share such deceased parent would have been entitled to if then living.”

“5. I give and bequeath all the rest and residue of my negro slaves to all my children, and their issue living at my death, to be equally divided between them,” &c.

This being all the evidence in the cause, the court charged the jury, “that the legacy of said negroes to the plaintiff was a specific legacy.” The defendants excepted to this charge, and asked the court to instruct the jury, “that said legacy was a general legacy, of the nature of a demonstrative legacy, and that the plaintiff could not recover if they believed all the evidence.” The court refused to give this charge, and the defendants excepted; and they now assign as error the charge given by the court, and the refusal to give the charge asked.

ELMORE & YANCEY, for the appellants, cited the following authorities: 2 Williams on Executors, 994, 999, 1000; Walls v. Stewart, 16 Penn. (4 Har.) 275; Mann v. Cope-land, 2 Madd. 223; Baliet's Appeal, 14 Penn. (2 Har.) 451; 3 Beavan, 349; 3 Rawle, 237; Jacques v. Chambers, 2 Collier, 435; Roberts v. Pocock, 4 Vesey, 158; Gallagher v. Gallagher, 6 Watts, 473; Smith v. Lampton, 8 Dana, 69; 3 Dess. 346; 10 Barr, 172; Childress v. Childress, 3 Ala. 72; 2 Root, 271; 2 Johns. Ch. 614.

GOLDTHWAITE & SEMPLE, *contra*, cited Richards v. Richards, 2 Price, 219; Ashton v. Ashton, 3 P. Wms. 384; Sleece v. Thorington, 2 Vesey, sr. 561; Badrick v. Stephens, 3 Bro. C. C. 431; Dean v. Test, 9 Vesey, 146; Bethune v. Kennedy, 1 My. & Cr. 114; Fontaine v. Tyler, 9 Price, 94; 1 Roper on Legacies, 214, 220, 241; Walker v. Walker, 26 Ala. 270.

WALKER, J.—It is a clear and undisputed proposition of this case, that the appellee was entitled to the recovery which she obtained in the court below, if the legacy of twenty negroes to her in the will of her deceased husband was specific. If an executor derives profit by the labor or hiring of slaves specifically bequeathed, he is responsible to the legatee for their reasonable hire, unless the slaves are required in the general administration of the estate. The principle is, that “specific legacies are considered as severed from the bulk of the testator’s property, by the operation of the will, from the death of the testator, and specifically appropriated, with their increase and emolument, to the benefit of the legatee, from that period.” If profit accrue to an estate by reason of the detention of specific legacies after they are due, it is a reasonable and just rule which gives such profit to the legatee; and, upon principle, it can make no difference, whether that profit consists of the interest upon stocks or the labor of slaves.—Keyes on Chattels, §§ 499, 500, 518, 519; 2 Wms. on Ex. 1221; 2 Lomax on Ex. (top 265,) marg. 152; 2 Roper on Leg. 1250.

[2.] The controverted question of the case is, whether the legacy is specific. The legacy to Mrs. Myers is of twenty negroes, *of average value of all those on the testator’s plantation*, for her life, with a remainder over. This bequest is followed by another, bequeathing the “*rest and residue*” of the testator’s “*negro slaves*” to his descendants. From these provisions of the will it is a necessary deduction, that the legacy to Mrs. Myers was a bequest, not of a definite number of negroes, to be supplied from any source; but of twenty of the testator’s negroes, of the average value of all those on his plantation. Is it, thus understood, a specific legacy? Is a gift of twenty of the *identical* negroes possessed by the testator, which are of average value of all his slaves, a specific legacy?

There are three different classes into which legacies are divided; those classes are denominated specific, demonstrative, and general, and each is distinguished from the other in the incidents which the law attaches to them respectively. A specific legacy is “the bequest of a par-

ticular thing or money, specified and distinguished from all others of the same kind." A demonstrative legacy is where the thing or money is not specified, and distinguished from all others of the same kind, but a particular fund is pointed out for its payment. A general legacy is one of *quantity* merely, and includes all cases not embraced in the two other classes. A specific legacy cannot be satisfied out of the general assets, nor will it abate with them. The reverse is true of general legacies. Demonstrative legacies differ from both, in this: that, unlike specific legacies, they may be satisfied out of the general assets, upon failure of the particular fund; and, unlike general legacies, they will not abate upon the failure of the general assets, but retain the right of satisfaction out of the particular fund. They are derived from the civil law, and take their name from the supposition, that they indicate the testator's intention to *demonstrate* the source of payment, and not to make the existence of the fund charged with the payment a condition of the legacy.—Roper on Leg. 192; 2 Lomax on Ex'rs, top page 69, 70, 71; 2 Wms. on Ex'rs, 993, 994, 995. Demonstrative legacies, like general legacies, in England, as a general rule, bear interest after the year; in this State, after eighteen months. Campbell v. Graham, 1 Russ. & Myl. 453; Hallet & Walker v. Allen, 13 Ala. 554; Keyes on Chattels, 356, § 518.

Where the bequest is of a part of a particular thing or money, it is specified and distinguished from all others of the same kind—it is individualized, and susceptible of distinct identification; and is, therefore, a specific legacy. On the other hand, if the legacy is of a given quantity, and the intention was merely to point out the particular fund or property by way of demonstrating whence the payment was to be derived, it is demonstrative.—See the authorities above cited; also, Baliet's appeal, 14 Penn. 45; Gallagher v. Gallagher, 6 Watts, 483; *In re Barclay's estate*, 10 Penn. St. R. 387. Thus, a gift of so much *stock*, out of some specified stock, is a specific legacy; but a gift of so much *money*, out of the particular stock, is a demonstrative legacy.—Hoskings v. Nicholl, 1 Younge & Collyer,

478; *Smith v. Lampton and Wife*, 8 Dana, 69. The distinction here is, that the testator intends, in the former case, to give the *identical* stock mentioned; whereas, in the latter, he is supposed merely to indicate the source, whence the prescribed quantity of money is to be paid.

The authorities show, that the gift of a part or residue of a particular debt is a specific legacy.—*Ford v. Fleming*, 1 Eq. Cas. Abr. 302; *Basan v. Brandon*, 8 Simon, 171; 2 *White & Tudor's Lead. Cas.* in Eq. pt. I, top pages 351, 352, 353, 354, 367. But a legacy of so much money, to be paid out of a debt, is demonstrative.—*Campbell v. Graham*, 1 Russ. & Myl. 453; *Colville v. Middleton*, 3 Beav. 57. A legacy to the testator's son, of so many of his horses as should amount to eight hundred pounds, is specific.—*Richards v. Richards*, 9 Price, 219. So, also, a bequest of so much—"a *part* of my stock."—*Kirby v. Potter*, 4 Vesey, 747; *Davis v. Cain*, 1 Iredell's Eq. 304; *Roper on Leg.* 204. Several bequests of different amounts of South-sea stock, followed by a bequest of the remaining specified amount of South-sea stock standing in the testator's name, were all regarded as specific legacies. *Sleech v. Thorington*, 2 Vesey, sr. 560. So, gifts of two different sums, out of a certain sum due on a described bond, and a gift of the residue, specifying the amount, were all held to be specific legacies.—*Badrick v. Stevens*, 3 Brown's C. C. 431. In North Carolina, a legacy to a certain value, to be taken out of the testator's notes, as soon after his death as it could be done, was decided to be specific.—*Perry v. Maxwell*, 2 Dev. Eq. 487, 502. See, also, *Ludlam's estate*, 1 Parsons' Select Cas. in Eq. 116; *Chanorth v. Beech*, 4 Vesey, 556; *Roberts v. Pocock*, 4 Vesey, 149; *Ashburner v. Macguire*, 2 Bro. C. C. 108; S. C., 2 *White & Tudor's L. C.* in Eq. pt. I, and notes page (top) 346, marg. 201; *Cogdell v. Cogdell*, 3 Dess. 346; *Walton v. Walton*, 7 Johns. Ch. 258; *Walls v. Stewart*, 16 Penn. St. R. 275; *Avelyn v. Ward*, 1 Vesey, sr. 419; *Howe v. Earl of Dartmouth*, 7 Vesey, 137; *Stanley v. Potter*, 2 Cox's Ch. Cases, 180; *Bethune v. Kennedy*, 1 Myl. & Cr. 114.

The bequest here is of a *part* of the testator's slaves.

The controlling application of many of the decisions above collated and cited to such a case is apparent. One of the tests of a specific legacy is, whether it would be adeemed by the failure of the thing given, or whether it would still be satisfied out of the general assets. Here, as the gift is of a part of the testator's slaves, it would clearly be a violation of the will to supply the want of the slaves by the purchase from the general assets of other slaves. It would give other and different property from that which is bequeathed by the will. Upon reason and authority we decide, that the legacy was specific, and that there is no error in the charge given, or in the refusal to charge. No other question than that which we have decided has been presented in argument, and we have, therefore, confined ourselves to it.

The judgment of the court below is affirmed.

COLLINS vs. DOE, EX DEM. ROBINSON.

[EJECTMENT FOR CITY LOT.]

1. *When mortgagee may maintain ejectment.*—Authorities cited by the court on the question, whether a mortgagee may maintain ejectment after payment of the mortgage debt.
2. *When vendor may maintain ejectment against purchaser.*—A purchaser of land, holding only his vendor's bond for title, cannot defeat an ejectment by the latter, although the sale was made under a mortgage and the entire purchase-money has been paid; nor does a sub-purchaser from him occupy any better position.
3. *Relevancy of evidence affecting title of purchaser.*—In ejectment by the vendor, against one claiming under the purchaser, if it appears that no conveyance was executed to the purchaser, the fact that he paid the purchase-money is immaterial and irrelevant, since such payment could not confer on him any legal title.
4. *What title may be sold under execution at law.*—A purchaser of land, holding only his vendor's bond for titles, has not such a title as is subject to levy and sale under execution at law.
5. *Validity of sale for taxes.*—The appellate court cannot affirm the validity of a sale and conveyance of land by a city tax-collector, when the record only sets out his deed to the purchaser.

6. *Limitation of real action.*—There is no statute of limitations of force in this State, applicable to an action of ejectment commenced within one year after the adoption of the Code, (January 17, 1853,) unless a bar was perfected under the statute which existed before the passage of the act of 1843.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. S. D. HALE.

THIS action was brought by Cornelius Robinson, against Robert C. Collins, to recover several city lots in Montgomery, and was commenced on the 9th January, 1854. The defendant entered a disclaimer as to all the lots mentioned in the declaration, "except the south one-third of lot No. 2 and the north one-third of lot No. 3," as to which he confessed lease, entry and ouster; and the cause was tried, on issue joined, at the spring term of said circuit court, 1857.

On the trial, as appears from the bill of exceptions, the plaintiff proved, by B. S. Bibb, "that he (plaintiff) was in possession of the premises sued for, about twenty years ago, for two or three years, and used them as a livery-stable; that when he went out of possession, (witness could not fix the exact time,) one John W. T. Reid went into possession; that when Reid went out of possession, (the precise time witness could not state,) the premises were constantly used as a livery-stable by various other persons, whose names he could not recollect, nor could he state the times when they entered and left the premises, nor under whom they entered and claimed, but he was satisfied no one of them held possession so long as ten years." The plaintiff having here closed his case, the defendant offered in evidence a deed for the premises, executed by the plaintiff to Smith & Eddins, dated the 13th April, 1835; and, being informed by the court that he might afterwards adduce evidence in reply to any new matter brought forward by the plaintiff, closed his defense. The plaintiff then offered in evidence a certified copy of a mortgage executed by Smith & Eddins to himself, of even date with his deed to them, conveying the premises to him to secure the payment of the purchase-money; which instrument is not embodied in the transcript. The

defendant then read in evidence a penal bond, executed by the plaintiff to said John W. T. Reid, dated the 8th November, 1837; which recited that the former had that day sold to the latter, "at public auction, at the court-house door in the city of Montgomery," said lots Nos. 2 and 3; and was conditioned that he should make to the latter, "at any time when demanded," "a good deed of conveyance for said lots by virtue of an authority from Smith & Eddins for that purpose, with a good warranty of title" in his own name. The defendant "then offered to prove, by parol, the fact that the plaintiff, at the time of the date of said bond, had sold the premises in dispute to said Reid." The court excluded this evidence, on the plaintiff's objection, and the defendant excepted.

The defendant then proved that, in June, 1842, said two lots were sold by the sheriff of Montgomery county, under several executions in his hands against said Reid; "and offered to read the sheriff's deed to the purchaser at said sale, one Edward Leonard, for the purpose of showing that said Leonard claimed title to the property." The court excluded this evidence, on the plaintiff's objection, and the defendant excepted. "It was further proved by the defendant, that the premises in dispute had always been enclosed, and used as a mule-lot by drovers. There was no evidence that Leonard had any notice of Robinson's claim to the premises, except such as might arise from the registration of the deed and mortgage." The defendant offered in evidence, also, a deed from John B. Garrett, the city marshal of Montgomery, dated the 19th March, 1841, which recited a sale of said lots by him for taxes due the city, and conveyed them to said Leonard as the purchaser at the sale; and which was offered in evidence "for the purpose of showing that said Leonard was claiming title to the premises in dispute." The defendant further proved, "that at the date of plaintiff's said bond to Reid, John Leonard, with his family, including said Edward Leonard, who was his son, was residing on a part of said premises; that Richard Owen afterwards went into possession of said lots, claiming title under Edward Leonard, from whom he received the possession; that

Owen afterwards sold that portion of said lots here in dispute to Wade Allen, who, by deed dated the 12th June, 1847, conveyed the same to the defendant in this suit; and that Owen still retained possession of the residue of said lots."

The defendant further proved, that said Reid, by deed dated the 19th November, 1840, sold and conveyed said lots to one George Baber, who went into possession at the date of his deed, but afterwards attorned to Edward Leonard, to whom he subsequently delivered the possession of the premises. He then offered to prove, by one Shackelford, "that in January, 1841, while said Baber was in possession of said lots under his purchase from Reid, becoming uneasy about his title, and fearing that Reid had not paid Robinson the purchase-money, he (Baber) requested witness, when he went to Mobile, where Robinson then lived, to call on Robinson, and ascertain from him whether or not Reid had paid him said purchase-money; that witness accordingly called on Robinson, in January, 1841, and informed him of Baber's uneasiness, and inquired of him whether or not Reid had paid the amount of said purchase-money; and that Robinson then and there replied, that Baber need not be uneasy about the matter, that Reid had paid him the full amount of the purchase-money, and that no part of the same was now due." The court excluded this evidence, on the plaintiff's objection, and the defendant excepted.

"The court charged the jury, among other things, that if they believed all the evidence offered by the plaintiff, he was entitled to a verdict, unless the defendant had given evidence of something to prevent the recovery; that Robinson's bond to Reid did not convey to Reid any title, and, under the circumstances, could not afford protection to Reid, or those claiming under or through him, and, consequently, formed no bar to the plaintiff's recovery; but, that if the defendant, and those under whom he claimed, held ten years adverse possession of the premises before the suit was brought, it would bar the recovery, although the defendant produced no written evidence of title."

“The defendant excepted to this charge, and then requested the court to instruct the jury, that if Edward Leonard had possession of the premises, under a *bona-fide* claim of title, since 1841, under his tax-title; and that Richard Owen, before the expiration of ten years, came into possession, claiming title under said Leonard; and that these two, joining their possessions together, had possession ten years before suit brought, claiming title *bona fide*; and that Allen claimed under Owen, and Collins under Allen,—then the plaintiff could not recover, and their verdict must be for the defendant. Which charge the court refused to give, and the defendant excepted.”

The errors assigned are, the rulings of the court on the evidence, the charge given, and the refusal to give the charge asked.

THOS. WILLIAMS, for the appellant.

MARTIN, BALDWIN & SAYRE, *contra*.

STONE, J.—It is contended for appellant, that the claim of appellee is only that of mortgagee, and that a recovery in ejectment cannot be had on such title, after the payment of the debt to secure which the mortgage was given. As bearing on this legal proposition, we cite the following authorities: 2 Greenlf. Ev. § 330; Burton v. Austin, 4 Ver. 105; Paxon's Lessee v. Paul, 3 Harris & McH. 399; Peltz v. Clarke, 5 Peters, 491.

We deem it unnecessary to decide the legal question stated above, for the following reasons:

1. The claim of appellee is not that of simple mortgagee. True, he conveyed the lands in controversy to Smith & Eddins, and took from them a cotemporaneous mortgage of the premises. The mortgage, however, contained a power of sale; and under that power, Mr. Robinson subsequently sold the lots to J. W. T. Reid, and gave him a bond to make title when called on. There is no evidence that any conveyance was ever made to Reid, or that title ever afterwards passed out of Robinson by any conveyance. All the subsequent claimants held

by successive transfers under Reid's ownership, thus acquired at mortgage sale. The appellant, then, does not claim title directly from the mortgagor, but from the sale subsequently made to Reid. It thus becomes unnecessary to inquire into the legal relation subsisting between Robinson and Smith & Eddins. As to these lots, that relation was determined by the sale which Robinson made as mortgagee. Collins claims under Reid's purchase, and his rights must depend on Reid's relation to Robinson, acquired by his purchase at the mortgage sale. He received but an obligation to make title; and under that obligation, he cannot defend against the paramount right of Robinson, his vendor.

2. There is no evidence that the mortgage debt from Smith & Eddins has ever been paid. It is probably true that Robinson sold the premises under the power contained in his mortgage, and that if the terms of that sale have been complied with, Reid, or whoever owns his rights under his purchase, can, in equity, compel a conveyance.—Walker's American Law, 320. Reid, however, and those claiming under him, stand in the relation of purchaser by executory contract to Robinson, the vendor to Reid.

[2.] Under the above state of case, leaving out of view for the present the statute of limitations, neither Reid, nor any one holding in his right, can defend against the title of Robinson; and at law it does not vary the case, if Reid has paid to Robinson the entire purchase-money. Chapman v. Glassell, 13 Ala. 50; Huddle v. Worthington, 1 Ohio, 195.

[3.] The propositions stated above are conclusive to show, that whether Reid had paid Robinson or not, was immaterial in this action. There was no error in rejecting evidence of payment by Reid.

Neither was there any error in rejecting oral evidence of the sale by Robinson, and purchase by Reid. That fact was proved by the bond; and no evidence of sale, short of a *conveyance of the title* by Robinson, could defeat the appellee's superior title.—Hilliard on Vendors, vol. 1, pp. 2, 3; Walker's American Law, 319, note.

[4.] Nor was there any error in rejecting evidence of the sheriff's sale under executions against Reid, and his deed to the purchaser. Reid had no title which was subject to levy and sale under execution.—*Elmore v. Harris*, 13 Ala. 360; *Causey v. Driver*, 13 Ala. 818.

[5.] There is not enough in the record to enable us to affirm the validity of the sale and conveyance by the city tax-collector.—*Blackwell on Tax Titles*, 430.

[6.] This leaves but the question arising on the statutes of limitation; and we feel constrained to declare, that there was no statute of limitations applicable to this case, of force when the action was brought, 9th January, 1854. The act of 1843, (Pamph. Acts, 17; *Clay's Digest*, p. 329, § 93,) is the only statute relied on by appellant.

Section 10 of the Code repealed "all acts of a public nature, designed to operate on all the people of the State," not embraced in the Code. The act of 1843 was an act of a public nature, and is not embraced in the Code. The only section of the Code which, in its provisions, resembles the act of 1843, is section 2476, subdivision 2. That section, construed in connection with article 2 of that chapter, pp. 457–8–9 of the Code, is essentially different from the provisions of the act of 1843; and hence we hold, that the former statute ceased to have any operation, when the Code went into effect, January 17, 1853.

Nor do the limitations provided by the Code apply to this case. This action was brought within a year after the Code went into operation, and is expressly covered by the exception in section 2502 of the Code.

The act of Feb. 15th, 1854, (Pamph. Acts, 71,) was passed after this action was commenced, and cannot affect the plaintiff's right to recover.

There is no error in the record, available to the appellant; and the judgment of the circuit court is affirmed.

MIMS vs. MIMS.

[BILL IN EQUITY BY WIFE FOR PERMANENT ALIMONY.]

1. *How wife, when insane, may sue.*—When the wife, suing by her next friend, files her bill for alimony against her husband, alleging insanity on her part, and cruelty and abandonment on the part of her husband; and the husband answers, denying all the allegations of the bill, but failing to raise any objection on account of its form,—he cannot reverse the chancellor's decree, rendered on pleadings and proof, on the ground that the wife, if insane, should have sued by committee, and not by next friend.
2. *Insanity excuses adultery.*—Adultery, committed by the wife while insane, is no bar to her claim for alimony.
3. *Abandonment of wife by husband entitles her to alimony.*—The legal abandonment of the wife by the husband, in driving her forth from his home without justifiable cause, and failing to furnish her with the means of support, entitles her to a decree for alimony.

APPEAL from the Chancery Court at Claiborne.

Heard before the Hon. WADE KEYES.

THIS bill was filed, in October, 1855, by Mrs. Parthenia Mims, a married woman, suing by her next friend, against Stanford Mims, her husband. Its material allegations were, that the said parties were married in July, 1839; that the defendant received about \$2,000 in cash, the property of his wife, which he invested in negroes, who had largely increased in number and value when the bill was filed; that four children were born of the said marriage; that the complainant, in 1847–8, “from long and continued neglect on the part of her husband, and almost insupportable abuse inflicted by him, became insane, and, after receiving many stripes at his hands, was driven by him from his house;” that she was received and cared for by her friends, who twice carried her back to her husband's house; that he refused to receive her each time, and again drove her forth; that her friends then carried her to a lunatic asylum in Georgia, where she was at the filing of her bill; that her husband refused to make any provision for her support or maintenance, and would not

defray her expenses at the lunatic asylum; and that his estate was worth from \$50,000 to \$75,000. The prayer of the bill was, that a portion of the defendant's estate, sufficient for the complainant's support and maintenance during her life, might be set apart for her separate use, and a trustee be appointed to take charge of it.

The defendant filed an answer; admitting the marriage as charged in the bill, but denying all its other allegations respecting the complainant's insanity, his abandonment of her, &c.; averring that the complainant voluntarily left his house, without cause or provocation on his part; that she had previously committed adultery with several persons, and that whatever harshness he afterwards exhibited to her was caused by the discovery of this conduct on her part.

A great number of witnesses were examined in the cause—thirty by the complainant, and forty-one by the defendant. The limits of a report preclude the publication of an abstract of this mass of testimony, nor is it necessary to the understanding of the legal points decided by the court. It is sufficient to say, that the complainant's testimony establishes the allegations of her bill, as to her insanity for several years before the filing of her bill, her husband's cruelty towards her, and his refusal to receive and support her; while the defendant's testimony fully proves adultery on the part of the complainant with several persons.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, which the defendant now assigns as error.

CHILTON & GUNTER, for the appellant.

THOMAS WILLIAMS, *contra*.

RICE, C. J.—The bill was filed in October, 1855, in the name of the wife, by her next friend, against her husband, for *alimony*. It appears that she was insane when the bill was filed, and had been insane for several years before that time. The first question to be considered is, whether the respondent, who in his answer insisted she

was not insane, who took several depositions, who did not demur to the bill, and failed to move the court below to have the bill taken off the file, is now, after a decree on a hearing on pleadings and proof by the chancellor, entitled to reverse that decree upon the single ground, that the wife sued by next friend, and not by committee.

The *fifteenth* of our revised rules for the regulation of the practice in chancery is in the following words :

“*All bills and petitions filed by married women, without their husbands, whether relating to their separate estate or not, shall be exhibited by next friend.*”—See 24 Ala., p. IV, rule 15.

If the wife had been sane, it is clear that, under that rule, her bill might have been exhibited by next friend. And whatever effect her insanity might have had, in England, upon her right to exhibit her bill in that mode, we are persuaded it cannot, in this State, have the effect to deprive her of that right. She has no estate, no guardian, no committee. She is afflicted, helpless, and in a lunatic asylum in a sister State, where she was placed by some of her friends, after the cruelty of her husband alleged in her bill. She seeks nothing but *alimony*. Her next friend can do nothing to her prejudice, but is as completely under the direction and control of the chancellor, as a committee appointed by the chancellor would have been.—*Bolling v. Turner*, 6 Rand. 584 ; *Isaacs v. Boyd*, 5 Porter, 388 ; *Longnecker v. Greenwade*, 5 Dana, 516. The chancellor's authority to protect the husband and bind the wife, is as complete when such a bill is exhibited by next friend, as when exhibited by committee. His jurisdiction is not affected by the substitution of either of these modes for the other. Whether it is to be filed in the one mode or the other, is, at most, a mere question of practice ; and although, in England, the practice may be to have such a bill exhibited by committee, and although it may there be “inconvenient to deviate from the regular practice ;” yet it is probable that, even there, circumstances may exist which justify a deviation from that practice ; and it is certain that, here, circumstances will justify a deviation from it.—*Gillbee v. Gill-*

bee, 1 Phillips' Ch. R. 121; Eyre v. Wake, 4 Vesey, 75; Machin v. Salkeld, 2 Dick. 634; Shelford's Law of Lunatics, 445; Rebecca Owing's case, 1 Bland's Ch. R. 290; Colegate D. Owing's estate, 1 Bland's Ch. R. 370; 2 Story's Eq. Jur. §§ 1334, 1336, 1362, 1365, and notes.

The conclusion attained by us is supported by Carr v. Boyce, 13 Ired. Eq. R. 102, where it was held, that a bill may be filed by the next friend, on behalf of a person of weak mind, and the fit subject for a commission of lunacy, his property being too small to bear the expense of a commission.—3 Chitty's Eq. Dig. 2451, § 15.

In Kavanaugh v. Thompson, 16 Ala. R. 817, it was held, that administrators could not complain that a decree, regular in form, was rendered by the orphans' court (a court of limited jurisdiction) against them, in favor of *infant* distributees, without the appointment of guardians *ad litem*, although the failure to appoint them was an error for which the decree could have been reversed at the instance and for the benefit of the infants. So, here, the husband as respondent, after having denied in his answer the insanity of his wife, and treated here as sane in the proceedings in the cause, and gone to trial on pleadings and proof, without moving to take the bill off the file, ought not now to be permitted to reverse the decree against him, on the mere ground that, as she was insane, her bill should have been filed by committee.

[2.] Adultery, committed by the wife when insane, is no bar to her claim for alimony, if that be the only objection to her claim.—Wray v. Wray, 19 Ala. R. 522. The proof convinces us, that the adultery of the wife, shown in this case, was committed by her when insane.

[3.] The cruelty and conduct of the husband, averred in the bill and established by the evidence, entitles the wife to alimony.—Glover v. Glover, 16 Ala. R. 440; Hanberry v. Hanberry, 29 Ala. 719.

We are satisfied there is no error in the decree of the chancellor, and affirm it, at the costs of the appellant.

BATES' ADM'R vs. BATES.

[ASSUMPSIT ON COMMON COUNTS—PLEA, STATUTE OF LIMITATIONS.]

1. *Demurrer to evidence.*—On demurrer to the plaintiff's evidence, and issue joined thereon, the question for the decision of the court is, whether, allowing every intendment which could be made in the plaintiff's favor, the jury might legally render a verdict for him on the evidence.
2. *Sufficiency of subsequent promise to remove statutory bar.*—A declaration by the debtor, to the attorney of the administrator of the deceased creditor, 'that he had once offered to settle the claim in lands, and either would or could now settle the claim in lands if the administrator was authorized to make any settlement of it,' held insufficient, on demurrer, to remove the bar of the statute of limitations. (Overruling *Newhouse v. Redwood*, 7 Ala. 598.)

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by James F. Bates, as the administrator *de bonis non* of Thomas Bates, deceased, against Joseph Bates, and was commenced on the 3d May, 1849. The cause of action was certain moneys, collected by the defendant, as sheriff of Mobile county, under execution against one William Roberts, against whom a judgment had been recovered by one Seth Stodder, and who was afterwards summoned by process of garnishment, at the suit of the executrix of Thomas Bates, as the debtor of said Stodder, and a judgment rendered against him for the amount of his indebtedness. The defendant pleaded the general issue, and the statute of limitations; and to the latter plea the plaintiff replied a subsequent promise. On the trial, the plaintiff offered in evidence the deposition of C. W. Rapier, and the file of chancery papers therein referred to. The material portion of Rapier's testimony was as follows: "A short time before the commencement of this suit, witness went with James F. Bates, across Royal street in the city of Mobile, to where Joseph Bates was standing, for the purpose of speaking with him on the subject of the claim on which this suit is founded, and to obtain a settlement

of the same if possible. Witness had with him at the time a file of chancery papers, in the case of William Roberts against Joseph Bates and others. The nature of the claim was mentioned to Joseph Bates in that interview. Witness does not remember that the amount of the claim was stated, and cannot distinctly recollect the exact words used by said Joseph Bates in offering to settle. He thinks, however, that he stated, in substance, that he had once offered to settle the claim in lands. Witness thinks, that said Bates said, in substance, that he either could or would now settle the claim in lands, if James F. Bates was authorized to make any settlement of the demand." The defendant demurred to the plaintiff's evidence, and the plaintiff joined in the demurrer. The court held the evidence insufficient to remove the bar of the statute of limitations, and therefore rendered judgment on the demurrer for the defendant; and its ruling is now assigned as error.

E. S. DARGAN, for the appellant, cited Newhouse & Co. v. Redwood, 7 Ala. R. 598; Ross v. Ross, 20 Ala. R. 105; Townes & Nooe v. Ferguson, 20 Ala. 147.

WILLIAM G. JONES, *contra*.

WALKER, J.—Upon demurrer to the evidence, the court below decided, that the testimony was not sufficient to sustain the replication of a subsequent promise to the plea of the statute of limitations. The only evidence relating to the issue upon the replication was given in by a single witness, and is as follows: "He [the defendant] stated, in substance, that he had once offered to settle the claim in lands; that he either could or would now settle the claim in lands, if James F. Bates was authorized to settle the demand." For the purposes of this opinion we grant to the appellant, that James F. Bates had authority to accept payment in lands, without considering the point, for the concession will not affect the result. The testimony, after that concession, will import a declaration of the defendant, either that he could now settle the claim in lands, or that he would now settle the claim

in lands. Adopting the alternative adverse to the party demurring to the evidence, the defendant is to be deemed to have said, that he would settle the claim in lands.

The question which the defendant raised by his demurrer, was, whether, allowing every intendment which could be made in favor of the plaintiff, there was a right of recovery, or whether the jury could legally have returned a verdict for the plaintiff upon the evidence.—*Shaw v. White*, 28 Ala. 637.

Subjected to this test, did the testimony authorize the judgment rendered by the court? We answer that it did. The testimony can, by no intendment, be construed to mean anything more than that the debt was just, and that the defendant was willing to pay in lands. It would do violence to reason to say, that a willingness to pay in lands was equivalent to an unqualified willingness to pay, and would attribute a meaning to the party's words, of which they are not susceptible. The willingness to pay was, then, qualified with the condition, that the payment should be in lands. There is no principle of law better settled, than that a promise upon condition will not prevent the operation of the statute, unless there was a compliance with the condition. That is the necessary effect of our own decisions, which maintain that an express or implied promise is necessary, and that a promise can only be implied where there is an acknowledgment of a liability and willingness to pay.—*Spyker's Adm'r v. Bradford*, 32 Ala. 134; *Darrington v. Pearson*, 32 Ala. 227; *Townes & Nooe v. Ferguson*, 20 Ala. 146; *Ross v. Ross*, 20 Ala. 105; *Crawford v. Childress*, 1 Ala. 482.

In *Bush v. Bernard*, 8 Johns. 403, an offer to pay in specific articles was held, as a matter of law, insufficient to revive the cause of action. The supreme court of the United States, on a demurrer to evidence, decided, that the replication was not sustained by the defendant's declaration that he would deliver the powder, for the failure to deliver which the action was brought, whenever the plaintiff settled a certain claim.—*Wetsell v. Bernard*, 11 Wheat. 309. This decision is approved by this court, in *Crawford v. Childress*, *supra*; and from it the assertion

that a conditional promise will not revive the cause of action is adopted in that case. As a legal proposition it was decided in *Davies v. Smith*, 4 Esp. 36, that the words, "I think I am bound in honor to pay, and I shall pay when I am able," would not remove the bar. The same decision was made as to the words, "I will pay as soon as I can," in *Tanner v. Smart*, 6 B. & C. 603, (13 E. C. L. 273.) In *Bell v. Morrison*, 1 Peters, 351, it is said, that the promise must be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed. In *Taylor v. Stedman*, 11 Iredell, 447, (S. C., 13 Iredell, 97,) it was held, that a promise to pay in good notes or judgments would not remove the bar. In *Mitchell v. Clay*, 8 Texas, 443, there was an offer in writing to pay in certain lands, at a certain price, or at a price to be determined by disinterested men. The supreme court of Texas decided, that the cause of action was not thereby revived. The unaccepted offer of a horse was decided not to be a good acknowledgment, in *Huff v. Richardson*, 19 Penn. 388.—See, also, Ang. on Lim. 249–254; *Cocks v. Weeks*, 7 Hill, 45; *Random v. Toby*, 11 How. 493; *Kensington Bank v. Patton*, 14 Penn. St. R. 479; *Smith v. Eastman*, 3 Cush, 355; *Adams v. Torrey*, 26 Miss. 499.

There was here no conflict in the evidence. The evidence was legally insufficient to remove the bar, and the court did not err in so ruling.

This court decided, in the case of *Newhouse v. Redwood*, 7 Ala. 598, that it was erroneous for the court to charge the jury, that an offer to pay the principal of the debt in notes, which was rejected, would not revive the cause of action. This decision was thus far clearly wrong, on principle and upon authority, as shown by the citations above adduced. We, therefore, are not willing to follow it.

The judgment of the court below is affirmed.

DRAKE vs. FLEWELLEN & CO.

[ACTION ON PROMISSORY NOTE BY PAYEE AGAINST MAKER.]

1. *Charter of private corporation not judicially noticed.*—The charter of a female college, which is a private corporation, cannot be judicially noticed by the appellate court.
2. *Execution of note by agent.*—A promissory note, signed by the defendant in his own name, with the addition of the words, "secretary Auburn Masonic Female College," *prima facie* imposes a personal obligation on him.
3. *Respective liabilities of principal and agent on note executed by agent.*—When an agent is sued on a promissory note which, *prima facie*, imposes a personal obligation on him, and seeks to defend himself on the ground that the note was in fact the contract of his principal, he must make his defense under a sworn plea; and, if the principal is a private corporation, must show that it had authority to bind itself.
4. *When general charge on evidence is erroneous.*—A general charge, in favor of the plaintiff's right to recover, is erroneous, whenever there is the least conflict in the evidence on any material point.
5. *Whether promise is original or collateral.*—If an agent of a private corporation contracts a debt on its supposed credit, when the corporation in fact had no authority to contract debts, the contract imposes an original, personal liability on the agent; but, if he gives his note, without any new consideration, for the amount of a debt previously contracted by another person for the corporation, such a note is a collateral contract, and void.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. S. D. HALE.

This action was brought by A. C. Flewellen & Co., against John W. W. Drake, and was founded on a promissory note, of which the following is a copy:

"Columbus, Ga., Jan. 1, 1853.

"\$805,87. One day after date, I promise to pay A. C. Flewellen & Co., or bearer, eight hundred and five 87-100 dollars, for value received.

"J. W. W. DRAKE, Secretary
Auburn Masonic Female College."

The defendant pleaded five pleas; of which the first was *non assumpsit*; the second, a special plea of *non est factum*, (each of which pleas was, by consent, "considered as sworn to,") and the others were in these words:

“3. That the note on which said action is founded, was executed and delivered to the plaintiffs for a debt due and owing to them by the Auburn Masonic Female College, a corporation under the laws of this State; that at the time of the date, execution and delivery of said note to the plaintiffs, defendant was the secretary of said corporation, under the rules and regulations passed and made by the board of directors thereof, [who] had, previously to the execution of said note by defendant, directed and authorized him, as such secretary, to execute to said plaintiffs the note of said corporation for said debt, and for and on behalf of the said corporation; that under this direction and authority of said board of directors, defendant executed and delivered said note to plaintiffs, in his capacity and character of secretary of said corporation, and not in his personal capacity, and executed and delivered the same for and on behalf of said corporation, and as the note of said corporation, and not as his own note, nor to create a personal liability on him; and that said plaintiffs, at the time they received said note, were informed that said note was intended to be and was the note of said corporation, given for said debt of said corporation, and not the note of this defendant, and as such they received it.

“4. That said note was executed and delivered to plaintiffs without any consideration therefor, received or to be received by this defendant, or given therefor by the said plaintiffs.

“5. That said note was executed and delivered to said plaintiffs by this defendant, for and on account of a debt due to said plaintiffs by the Auburn Masonic Female College, and the consideration thereof is not expressed in said note.”

The plaintiff took issue on the first plea, moved to strike out the fifth, and demurred to the others on the following grounds: “1st, because the second plea does not deny the execution of the note by the defendant, but only alleges that he did not execute it personally, or in his individual capacity—*non constat*, he may be personally liable upon the note; 2d, because the third plea does not

allege that the corporation, or board of directors, had the power to execute a contract; 3d, because the fourth plea does not aver that no consideration passed from the plaintiffs to some other person than the defendant." The court sustained the motion to strike out the fifth plea, and also sustained the demurrer to the second, third and fourth pleas; and the defendant reserved exceptions to each of these rulings.

"On the trial," the plaintiff having read in evidence the note sued on, "the defendant proved by one of the board of directors at its organization in October, 1851, who continued as such until 1853, that the defendant was, from its organization, the secretary of said corporation, until he ceased to act as a member of the board in 185-; and there was no evidence that there was any other person secretary than the defendant. The defendant introduced evidence, also, that in 1852, or about the time of the date of said note, said corporation had purchased books from the plaintiffs, but to what amount was not shown; also, that one of the plaintiffs admitted that the debt, for which said note had been given, was a debt of the said corporation, and not of the defendant, and said that it was the note of the college, and that he received it as the note of the college. The charter of the corporation was also introduced. This was all the evidence; and thereupon the court charged the jury, that if they believed the evidence, they must find for the defendant; to which charge the defendant excepted."

The rulings of the court on the pleadings, and in the charge given to the jury, are now assigned as error.

ELMORE & YANCEY, for the appellant.

CLOPTON & LIGON, *contra*.

STONE, J.—The Auburn Masonic Female College is a private corporation, [Dartmouth College v. Woodward, 4 Wheat. 518;] and although the bill of exceptions states that "the charter of the incorporation was also introduced," we do not find it in the record. Under these circumstances, we have no authority to consider any of

the provisions of that act, in passing on the legal questions presented.—See Pamphlet Acts of 1851-2, p. 359.

[2.] The complaint alleges, the note was made by the defendant. The note copied in the bill of exceptions imposes, *prima facie*, a personal liability on the defendant. See Gillespie v. Wesson, 7 Porter, 461; Tippetts v. Walker, 4 Mass. 595; Taft v. Brewster, 9 Johns. 334. That personal liability, however, can be shifted by pleadings and proof. See Lazarus v. Shearer, 2 Ala. Rep. 718; McTyer v. Steele, 26 Ala. 487; Baker v. Gregory, 28 Ala. Rep. 544.

[3.] Under our statute, and the construction placed on it, a defendant who has executed a contract which, *prima facie*, charges him personally, and who yet seeks to rebut that *prima-facie* intendment, by showing that, in fact, the contract is that of his principal, must make his defense under a sworn plea.—Code, § 2238; Lazarus v. Shearer, 2 Ala. 718; McWhorter v. Lewis, 4 Ala. 198.

To render the defense available under our decisions, it must also appear, that the corporation had authority to bind itself.—Harwood v. Humes, 9 Ala. 659; Gillespie v. Wesson, 7 Porter, 454-61; Mott v. Hicks, 1 Cow. 513-36; White v. Skinner, 13 Johns. 307.

Under these rules, neither the third plea, nor the evidence in the record, shows that the corporation "had the faculty of becoming bound;" and hence, in these respects, the defense was not made out.

[4-5.] The charge renders it necessary for us to notice another point. It only referred to the jury the credibility of the evidence; and instructed them, on every hypothesis of which the testimony, if believed, was susceptible, to find for the plaintiffs. This was not justified by the state of the proof, all of which purports to be set out in the record. The bill of exceptions leaves it in doubt, whether the books for which the note was given, were purchased at the time the note was given, or whether the defendant had any agency in their purchase. Evidently, if the corporation had no authority to contract a debt, and Mr. Drake assumed to pledge its credit, and himself bought books upon its supposed credit, he would thereby

impose a personal liability on himself. On the other hand, if he had no agency in obtaining the credit for the corporation; in other words, if some other person bought or ordered the books, and he, without any new consideration, gave his note for books thus purchased or ordered by another, such note would be within the statute of frauds, and void.—*Hester v. Wesson*, 6 Ala. Rep. 415; *Bullock v. Ogbourn*, 13 Ala. Rep. 346; *Holt v. Robinson*, 21 Ala. Rep. 106.

The evidence leaves these questions in doubt; and they should have been referred to the jury.

Reversed and remanded.

COTTEN vs. RUTLEDGE.

[QUI TAM ACTION AGAINST PROBATE JUDGE FOR ILLEGALLY ISSUING MARRIAGE LICENSE.]

1. *Specification of grounds of demurrer.*—On demurrer to a complaint, (Code, § 2253.) the court cannot consider any other objection than that specifically stated in the demurrer.
2. *Construction of statute requiring consent of parent or guardian to marriage of minor.*—Under section 1950 of the Code, requiring the consent of parents or guardians to the marriage of minors, it is not necessary that both parties to the intended marriage should be within the specified ages: if the male is under twenty-one years of age, and has not had a former wife; or if the female is under eighteen years of age, and has not had a former husband,—in either case, the consent of the parent or guardian of such minor is necessary.
3. *What constitutes defense to action for statutory penalty.*—In issuing a marriage license, a judge of probate acts ministerially, not judicially; and if he issues a license to a minor, without the consent of the parent or guardian, as required by section 1950, the fact that he honestly believed that the infant was of lawful age, or that the infant made affidavit before him that such was the fact, is no defense to an action to recover the penalty prescribed by section 1953.
4. *Motion to suppress deposition on account of defective statement of case.*—In a *qui-tam* action under section 1953 of the Code, it is no ground for the suppression of a deposition taken by the plaintiff, that neither the commission nor the interrogatories show the character of the action.

5. *Verdict and judgment.*—In such action, if the plaintiff recovers at all, his recovery must be for the amount of the statutory penalty; and a verdict “for the plaintiff,” not specifying any amount, is sufficient to authorize a judgment in his favor for the statutory penalty, with the costs of suit.
6. *Waiver of argument to jury.*—When the counsel of both parties have waived their right to argue the cause to the jury, by declining to argue it before them after the evidence on both sides is closed, the fact that the court afterwards allows one party to read to the jury, on their return for further instructions, a record which had been previously read to them, does not revive the right of the other to argue the cause to the jury.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Joseph Rutledge, against Alexander J. Cotten, the probate judge of said county, to recover the statutory penalty (Code, § 1953) for issuing a marriage license to a minor without the consent of the parent or guardian. The parties to the marriage were David Hale and Nancy M. Rutledge; the latter being, as the complaint alleged, the daughter of the plaintiff, and under eighteen years of age at the time of the marriage. The defendant demurred to the complaint, “because it did not aver that David Hale, the male intending to marry, was under twenty-one years of age at the time the license was issued.” The court overruled the demurrer, and the defendant excepted. The defendant then interposed a special plea, averring, in substance, that when application was made to him for said license, he demanded the consent of the parent or guardian of the said Nancy; that said Hale and other persons then assured him that she was eighteen years of age, and, on his refusal to issue the license without further proof, said Nancy herself made and subscribed before him a written affidavit of the fact that she was of that age. To this plea the court sustained a demurrer, and the defendant “then took issue on the complaint.”

On the trial, the plaintiff produced and read in evidence to the jury the record book containing the marriage licenses granted by the probate court of said county, which showed the license issued to said David Hale and Nancy Rutledge; proved that the defendant was the pro-

bate judge at the time said license was issued; and, for the purpose of proving the age of his said daughter, offered in evidence the deposition of one Nancy Davis. The defendant objected to the reading of the deposition, "because it did not appear from the interrogatories, commission and deposition that the same was taken in this case; it appearing to be taken in a case in which Joseph Rutledge was the plaintiff, and not in a case in which Joseph Rutledge sued for the use of the State of Alabama." The court overruled the objection, and permitted the deposition to be read; to which the defendant excepted.

The defendant offered evidence tending to prove the facts averred in his special plea, to which a demurrer had been sustained, relative to the proof made before him, at the time of the issue of the license, that the said Nancy Rutledge was eighteen years of age. The court excluded this evidence, on the plaintiff's motion, and the defendant excepted.

The counsel of the respective parties declined to argue the case to the jury. The court then charged the jury, and they retired to consider of their verdict. After deliberating for some time, the jury came into court, and said that they could not agree upon a verdict; and one of them asked the court, whether it had been proved that the license was issued. The court replied, that the record of a license had been read to them; and then permitted the plaintiff's counsel again to read to them the record of the license which had been previously read to them. The defendant's counsel then insisted on his right to argue the case before the jury; the court would not permit him to do so, and the defendant excepted.

The jury returned a verdict in these words: We, the jury, find for the plaintiff;" and the court thereupon rendered a judgment in his favor for \$500, the amount of the statutory penalty, together with the costs of suit.

The errors now assigned are, the rulings of the court on the pleadings, the several rulings during the trial to which exceptions were reserved, and the rendition of judgment on the verdict for the plaintiff.

PARSONS & J. WHITE, for the appellant.

J. J. WOODWARD, *contra*.

RICE, C. J.—This action was brought to recover the penalty of five hundred dollars, which is imposed by section 1953 of the Code upon a judge of probate, for issuing a license to marry contrary to the provisions of the article in which that section is embraced.

The only objection to the complaint, stated in the demurrer thereto, is, that it does not aver “that, at the time the license issued, David Hale, the male intending to marry, was under twenty-one years of age.” No other objection can be taken, (Code, § 2253;) and we first proceed to consider the single objection stated.

[2.] There is awkwardness and confusion in the structure of the first sentence of section 1950 of the Code. The intention of the lawmaker is not therein expressed with anything like clearness. But we think it sufficiently appears from the words employed in it, that it was designed to secure to parents and guardians some power of restraint over the marriage of male minors, as well as over the marriage of females under the age of eighteen years of age. The construction contended for by the defendant, would destroy such power in almost every case. It would allow the judge of probate, with impunity, and without the consent of parent or guardian, to issue a license to marry a male of three-score years and ten to a female of fifteen, or a female of sixty to a male of eighteen. We cannot persuade ourselves that the legislature intended licenses to issue in such cases, without the consent of the parent or guardian of the minor. We think the provisions of the first sentence of section 1950 must be taken distributively, and as making it the duty of the judge of probate to require the consent of the parent or guardian of the minor to the marriage, to be given in two distinct classes of cases, to-wit, 1st, where the male intending to marry was under twenty-one, and had not had a former wife; and, 2d, where the female intending to marry was under eighteen, and had not had a former husband. This construction serves, in some sort, to

account for the use of the word "and," where it first occurs in the sentence, and makes the sentence mean what it would clearly express if it read as follows: "If the male intending to marry be under twenty-one, and have not had a former wife, the judge of probate must require the consent of his parent or guardian to the marriage, to be given either personally, or in writing; and if in writing, the execution thereof must be proved;—and if the female intending to marry be under eighteen years of age, and have not had a former husband, the judge of probate must require the consent of her parent or guardian to the marriage, to be given either personally, or in writing; and if in writing, the execution thereof must be proved." That reading, in our opinion, shows the true meaning of the first sentence of section 1950 of the Code; and it accords with the principle, that upon the revision of statutes, the construction will not be changed by such alterations as are designed to render the provisions more concise.—*Mcoers v. Burkner*, 9 Foster, 420; *Clay's Digest*, 373, § 5.

[3.] In issuing a license to marry, the judge of probate does not exercise *judicial power*. He acts *ministerially*, and at his peril. His duty in that behalf is defined by the Code. If, before issuing a license to marry any minor, he obtains the consent of the parents or guardians of such minor, he is safe. If, without the consent of the parents or guardian of a female under eighteen years of age, who has not had a former husband, he issues a license to marry her to a male, he violates his duty as prescribed by section 1950 of the Code, and thereby incurs the penalty of five hundred dollars mentioned in section 1953; and neither her affidavit, made before him, that she was eighteen years old, nor his honest belief that she was of that age, can relieve him from the penalty, nor properly be considered in a suit brought to recover it. Good faith is no protection against the consequences of the violation of the duty prescribed by the statute.—*Sedgwick on Stat. and Cons. Law*, 99, 100, and authorities there cited.

[4.] Any person may sue for the penalty, when it has been incurred. The person who may sue for it, may

properly be styled the plaintiff in the action, although he sues as well for the State as for himself. And the fact that he is stated as the plaintiff, in the interrogatories, commission and return of the commissioners, is no valid objection to a deposition offered as evidence in the suit. In other words, it is not essential that the person suing for the penalty should show, in his *interrogatories and commission*, that he is suing as well for the State as for himself.—*Jordan v. Hazard*, 10 Ala. 221; *Lloyd v. Williams*, 3 Wilson, 141; *The Weavers' Company v. Forrest*, 2 Strange, 1232; *Rogers v. Jenkins*, 1 Bos. & Pul. 384; *Agee v. Williams*, at January term, 1857.

[5.] When, as here, such suit is for a sum of money fixed by law as the penalty for the act of the defendant alleged in the complaint, and the case is tried on an issue joined on the complaint, if the plaintiff recovers at all, he must recover the specific sum fixed as the penalty; he cannot recover more or less; and the verdict of the jury, "we, the jury, find for the plaintiff"—is sufficient to authorize a judgment for the sum fixed by law as the penalty, and for the costs of the action.

[6.] Counsel may waive the right to argue a case before the jury. Declining to argue it before them, after the evidence is closed on both sides, is a waiver of that right. And when the right is thus waived, it is not revived by allowing either party to read from a record book a piece of evidence which had in the course of the trial been properly read to the jury, although such second reading of that piece of evidence was permitted after the jury had been charged and had retired, and on their return into court to inform the court that they could not agree on a verdict.—*Prosser v. Henderson*, 11 Ala. 484.

The application of the foregoing views to the several questions presented for revision in this case, brings us to the conclusion, that there is no error in any of the rulings of the court below complained of by the appellant.

Judgment affirmed.

CITY COUNCIL OF MONTGOMERY *vs.* GILMER & TAYLOR.

[ACTION AGAINST MUNICIPAL CORPORATION FOR NEGLIGENCE.]

1. *Liability of municipal corporation for negligent construction of sewers.*—In the construction of sewers, a municipal corporation acts ministerially, and is responsible for damages caused by the careless and negligent manner in which that duty is discharged.
2. *Sufficiency of complaint in averment of facts instead of legal conclusion.*—In declaring against a municipal corporation, for damages caused by its neglect of duty in repairing streets and constructing sewers, an allegation that the defendant “wrongfully” refused to repair the streets, and “wrongfully” suffered large quantities of water to accumulate, &c., is the averment of a legal conclusion, and, consequently, is insufficient.
3. *Liability of municipal corporation for damage caused by flow of rain-water.* Where a municipal corporation is charged by its charter with the duty of keeping its streets in repair, an action lies against it for damages caused by its neglect of that duty; but it is not, *prima facie*, responsible for damages caused by its failure or omission to prevent the flow of rain-water from the streets upon the adjacent lots, inasmuch as the legal duty of adopting a judicious system of drainage is legislative in its character.
4. *Relevancy of evidence in such action.*—In an action against a municipal corporation for damages caused by its neglect of duty in repairing streets and constructing sewers, it is competent for the plaintiff to prove notice to it of the condition of the street, and its failure or refusal to repair; but evidence showing the motives which influenced the individual members of the corporation in refusing to support a proposition to repair, or that they were influenced by malice towards the plaintiffs, is irrelevant and inadmissible.
5. *Same.*—The fact that the corporation was informed, at a meeting of its council, through the report of one of its committees, that some slight repairs had been made upon a ravine in the street, is admissible evidence for the plaintiff, as tending to show a recognition of the street by the corporation, as well as notice to it of the character of the repairs.
6. *Opinion of witness as expert.*—A practical brick-mason, who had aided in the construction of plaintiff’s wall, may be asked his opinion as an expert, whether the quantity of rain which fell on plaintiff’s premises within the wall was sufficient to wash it down.
7. *When exception to charge of court must be reserved.*—An exception to a charge given by the court to the jury, must be taken before the jury leave the bar, and comes too late after that time.
8. *Conclusiveness of judicial decisions.*—An opinion of the supreme court, whether right or wrong, is the law of the case in which it is pronounced, and is not open to revision on a second appeal; consequently, if that opinion asserts that, upon all the evidence set out in the bill of exceptions, the court below might have instructed the jury that the plaintiff was not entitled to recover, it is conclusive against the plaintiff’s right of recovery on every aspect of the case which that evidence tended to establish, whether presented by the pleadings or by the instructions to the jury.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by the appellees, in October, 1851, "to recover damages for the defendant's negligence and carelessness in permitting the rain-water to run upon plaintiffs' lots, Nos. 1, 2, 9 and 10 in square No. 2, known as the Bibb & Nickels warehouse, from — street in the city of Montgomery, and thereby washing and undermining plaintiffs' said lots, and injuring the same." The case was before this court at its January term, 1855, when the judgment of the circuit court was reversed, and the cause remanded.—See 26 Ala. 665. After the remandment of the cause, the venue was changed, on the application of the plaintiffs, from Montgomery to Lowndes county, where a second trial was had at the spring term, 1857.

The declaration contained five counts, which were, in substance, as follows :

1. That the defendant, contriving and intending to injure plaintiffs in the use and possession of their lots, and to render the same incommodious, unfit for occupation, and of little or no value, "wrongfully and unjustly erected and built, and caused to be erected and built, a certain sewer or gutter, to be used in conducting water through and from certain streets in the city of Montgomery, which said sewer was erected and built near to plaintiffs' said lots and premises, in so careless, negligent and improper a manner, that by reason thereof, afterwards, to-wit," &c., "divers large quantities of water ran and flowed from said sewer, down, to, upon, against and into plaintiffs' said lots and premises, and thereby greatly injured and damaged said lots and premises, and tore up and washed away a large part of the soil thereof; and that, by reason of the premises, plaintiffs' said lots and premises became and were incommodious and unfit for use and occupation."

2. That whereas the defendant, at the time of the grievances complained of, "was in possession of, and had authority and control of, certain sewers, or water conductors, in the streets of Montgomery, near to plaintiffs'

said lots and premises, and, by reason thereof, ought to have hindered and prevented the water, from time to time being in said sewers, from running and proceeding therefrom, into, upon and against the plaintiffs' said lots and premises;" nevertheless, said defendant, knowing the premises, but contriving and intending to injure plaintiffs, &c., "wrongfully and unjustly suffered and permitted large quantities of rain-water to penetrate, issue and flow, from and out of said sewers, upon, against and into plaintiffs' said lots, and thereby greatly damaged and injured said lots, and tore up, undermined and washed away a large quantity of the soil," &c.

3. That whereas the defendant, at the time of the commission of the grievances complained of, "was in duty bound to keep the streets in said city of Montgomery in good repair, and to protect the plaintiffs' property in said town from injury and damage arising from a flow of rain-water through said streets, if the same could be done by reasonable care and diligence; and whereas Moulton street in said city was one of the streets which defendant was thus bound to keep in repair, so that rain-water should not flow therefrom upon plaintiffs' property, and was near to and adjoining plaintiffs' said premises; and, by reason of the premises, said defendant ought, before and at the time of the commission of the grievances hereinafter mentioned, by reasonable care and diligence, to have hindered and prevented rain-water, from time to time falling and running into said street, from running and proceeding therefrom, into, upon and against plaintiffs' said lots and premises, in such manner as to injure and damage said lots and premises;" nevertheless, said defendant, disregarding its duty in that behalf, and contriving and intending to injure plaintiff, &c., "wrongfully and unjustly suffered and permitted said Moulton street to be and remain out of repair, and refused to repair the same, and wrongfully and unjustly suffered and permitted large quantities of rain-water to run through said street, so being out of repair as aforesaid, to, in, against and upon plaintiffs' said lots and premises, and thereby greatly injured and damaged said lots and premises, and thereby

caused a large brick wall of plaintiffs, then and there being on plaintiffs' said lots and premises, to be undermined, to fall and to be washed away, and thereby also caused a large quantity of the earth and soil in said lots to be undermined, torn up and washed away," &c., "when said damage and injury could have been prevented by reasonable care and diligence," &c.; by means whereof, plaintiffs were greatly injured in the use and occupation of their said lots, and were forced to lay out and expend large sums of money in the reconstruction of the wall, &c.

4. That whereas the defendant ought of right to have repaired and kept in repair the streets surrounding the square on which plaintiffs' lots were situated, so as to prevent the washing of said streets, and the tearing up and washing away of the soil by the running and flowing of rain-water; nevertheless, knowing the premises, and intending to injure plaintiffs, &c., "said defendant wrongfully and unjustly permitted said streets to be and remain out of repair for a long time, to-wit," &c., and to be greatly injured and washed away by the rain-water flowing and running through and upon them, whereby a large quantity of the earth and soil was washed away from the plaintiffs' lots; that in consequence of the injury thus done to their lots, (of which they gave notice to the defendant, who still failed and refused to make the necessary repairs on said streets,) and to protect their lots from such injury and damage in future, plaintiffs were compelled, at great expense, to build a brick wall on said lots for their protection and security against the injury and damage which would otherwise result from the running and flowing of the rain-water from the streets; that after the erection of said wall, the defendant still neglecting and refusing to repair the said streets, and permitting the rain-water to continue to flow against and upon said lots and wall, thereby the rain-water undermined and washed away said wall, and tore up and washed away large quantities of earth, &c., whereby plaintiffs were compelled to erect other walls, &c.

5. That whereas, from time immemorial, large quantities of rain-water had been accustomed to flow into the

Alabama river, running off on the eastern and northern sides of the square on which plaintiffs' lots were situated, and not flowing through or upon said square; the defendant, contriving and intending to injure plaintiffs, &c., "wrongfully and unjustly erected and built, and caused to be erected and built, divers dams and banks, of great length," &c., "and dug and cut down divers ditches," &c., and continued to keep them open for a long time, and, "by means thereof, diverted and turned large quantities of rain-water, which had been accustomed from time immemorial to flow off as aforesaid, and which otherwise would have continued to flow off into the Alabama river, passing to the east and north of said square, and which said defendant thereby hindered and prevented from flowing off as it had been accustomed to do, and conducted the same, by means of said dams and ditches, into and along said Moulton street, over the bank of said river, at or near a point where said Moulton and Water streets intersected, and where said Moulton street strikes into the stream of the Alabama river, without using the proper and necessary care, skill and means to prevent said rain-water, so diverted as aforesaid, from wearing, tearing up and washing away the said river-bank, and the soil and earth thereof, at the points where said water was conducted into the river," &c.; that thereby, "through the carelessness, negligence and want of skill of the defendant," the said river-bank, with the soil and earth of said street, was washed away by the said rain-water; that this washing away of the soil extended up to and upon plaintiffs' said lots, and a large space of ground was thereby washed out and carried away; whereby plaintiffs' said lots were greatly injured and damaged, and they were compelled to expend large sums of money in filling up said excavation, and in erecting walls to protect their lots from further damage, &c.

The defendant demurred to the entire declaration, and to each count separately; and, the demurrer being overruled, pleaded the general issue, "in short by consent, with leave to give in evidence any special matter in bar, and like leave to the plaintiffs to reply."

The evidence adduced on the trial, respecting the situation of the plaintiffs' lots, the condition of the adjacent street, the undermining of the plaintiffs' wall, &c., was substantially as follows: The plaintiffs' lots, which they purchased on the 4th January, 1850, were bounded on the south by Moulton street, and on the west by Water street, and lay within thirty yards of the Alabama river. Moulton street was laid down on the city map as extending to the Alabama river; but the lower portion of it, extending up to or near the plaintiffs' lots, had not been used or worked as a street, (at least as far back as 1832,) on account of a ravine which had formed in it, and which constituted the natural outlet for the rain-water which fell upon that portion of the city covering an area of about sixty-five acres. This ravine gradually increased in size, and the increase became more rapid as that portion of the city was improved. Prior to 1850, it had encroached considerably on said lots bought by the plaintiffs, and extended back from the river about one hundred and forty yards; and at one point, on account of the projection of a bluff on the south side, the whole ravine was there thrown on said lots. In 1842, the corporation opened several new streets in that portion of the city, and so ditched them that the water flowed from them down into Moulton street, and thence into said ravine. It was shown that, although these new streets, thus ditched, changed the direction of the water, they were within the natural basin which had previously emptied into the ravine, and did not divert into it any water which did not naturally flow into it. One witness testified, however, that the effect of ditching the streets was to increase the quantity and rapidity of the flow of water. The flow of water into said ravine was further increased by the cutting down of the timber and the clearing up of the lots in that portion of the city which constituted the natural basin of the ravine.

In 1851, said ravine was several hundred feet in length, from thirty to fifty feet in breadth, and about fifteen feet deep; and extended partly on Moulton street, and partly on plaintiffs' lots Nos. 9 and 10. In the summer of 1851,

the plaintiffs informed one of the aldermen of the city that they desired to improve their lots, and to erect a warehouse on them, and desired the corporation to fill up the ravine; and this information was communicated by the alderman to the council of the corporation, at one of their regular meetings, and the subject was then discussed by them. The plaintiffs asked a witness who was a member of the council, and who was present at said meeting, "if some of the members did not express themselves willing to repair the ravine if plaintiffs would give up certain wharf privileges claimed by them, of which they had enjoyed the uninterrupted possession for twenty years; and the witness answered, that two of the members did." The defendant objected to this question and answer, and reserved an exception to the overruling of the objection. The plaintiffs also asked another witness, who was the mayor of the city in 1851, and as such a member of the council, "if he would not have been willing to repair said ravine if plaintiffs would have given up said wharf privileges; and the witness answered, that he would." The defendant objected to both this question and answer, and excepted to the overruling of the objection. It was further shown by the plaintiffs, "that at said meeting of the city council, one of the members expressed personal hostility to Gilmer, one of the plaintiffs—said that he was a shrewd, sharp man, always trying to make money out of the city; that he believed him to be a rascal, and would see him and his property in hell before he would vote a dollar to improve said ravine." To this evidence no objection seems to have been made, and no exception reserved.

At the meeting of the council above referred to, which was held on the 23d June, 1851, a committee was appointed to contract for the boxing and grading of said ravine; but said committee was discharged on the 12th August, having done nothing in the matter. In the meantime, that is, between the appointment and the discharge of said committee, the regular street committee, a standing committee, threw a large quantity of brushwood into the head of the ravine, and verbally reported their action to a

meeting of the council; but the record book kept by the council, in which its proceedings were entered, did not show any such report. The defendant objected to the admission of this evidence, and reserved an exception to the overruling of the objection.

Soon after said brushwood was thrown into the ravine, the plaintiffs commenced building a brick wall along the line of their lots. "Said wall was built about seventy feet on Water street, and about two hundred feet on Moulton street, in the bottom of said ravine. The bottom of that part of said ravine was sandy and gravelly, and partly of clay. As said wall was being built, plaintiffs graded down the earth from the lot on the inside of the wall, and threw it up against the wall, and made a side-walk on the outside of the wall, about six or eight feet wide, and about six feet high. Said wall was three feet wide at the bottom, and about eighteen inches wide at the top, and about twelve feet high at the lower end. It was built of good brick, and water-proof cement. In the erection of said wall, plaintiffs had partly cut away the point of earth which extended up to their lots, and built the wall and side-walk at that point so that not more than two feet intervened between the side-walk and the opposite side of the ravine. One of the aldermen testified, that he had a conversation with Gilmer about this point of earth, while said wall was being built, and advised him to cut it down; but that Gilmer refused to do it, saying that the council ought to do it, as it was on the street, and that it might affect his right to sue the city if he cut it down. Said witness further testified, that he never communicated this conversation to the city council, or any member of it; and that the city hands could have cut down the point in two hours. Said point was about three feet higher than the wall, and was perpendicular; and the soil at the base was composed of loose gravel, easily washed."

In August, 1851, before the completion of said wall, a heavy rain fell in Montgomery, which undermined the said bluff in the street, washed down a portion of the plaintiffs' wall, and carried away the earth which had

been placed on both sides of it. "The evidence tended to show, that the damage was caused by the bluff being undermined, and either knocking down said wall, or damming up the ravine, and forcing the water over the wall. There was evidence, also, tending to show that the water which fell on a portion of plaintiffs' lots, and on one side of their warehouse, ran down on the inside of said wall, and that there was no way provided for carrying it off." Two witnesses testified, on the part of the defendant, that the erection of a brick wall in such a place was an imprudent act, as it would probably be undermined and washed down. The plaintiffs asked a practical brick-mason, who had aided in the construction of their wall, and who was examined as a witness in the cause, "whether, in his opinion, the rain which fell within the wall was sufficient to wash it down; and the witness answered, that it was not." The defendant objected to the admission of this question and answer, and reserved an exception to the overruling of the objection.

In the latter part of the year 1851, after plaintiffs' wall had been thus washed down, the defendant let out a contract for the erection of a brick sewer under said street, and the grading of the same; which contract was taken by one of the plaintiffs, as the lowest bidder, at the price of \$3,700. After the completion of that work, the place which had been occupied by the ravine was used as a street, and no further damage was done by the flow of the water. There was evidence, also, tending to show "that it would have been impracticable to repair a portion of said ravine without the joint co-operation of the owners of said lots Nos. 9 and 10."

The above is the substance of all the evidence adduced on the trial, as the same is set out in the bill of exceptions. On this evidence, the court, of its own motion, gave two affirmative charges to the jury; "to which charges the defendant excepted, after the jury had retired, but before they brought in their verdict." The decision of this court on the sufficiency of this exception renders it unnecessary to state these charges.

The court also gave to the jury, at the request of the plaintiffs, the following written charges :

“1. If the jury believe from the evidence that the city council of Montgomery has diverted a considerable quantity of water from its natural course, so as to cause its flow into and upon the plaintiffs’ property described in the declaration, so as to injure their said property, then it was the defendant’s duty to take proper precautions to prevent the water so conducted from doing any injury to the plaintiffs ; and if the jury are satisfied that proper precautions were not taken by the defendant, the plaintiffs are entitled to recover for any injury so sustained from such neglect.

“2. If the jury believe from the evidence that about sixty-five acres of land in the city of Montgomery were naturally drained through a ravine standing partly on the plaintiffs’ property, and the defendant, by digging ditches and laying down boxes, so altered the flow of the water as to greatly increase the quantity which found its way to the plaintiffs’ property, and to accelerate its flow, so as to deliver a much larger quantity of water in the same space of time, near to and on the plaintiffs’ property ; and that the damage to plaintiffs’ property was thereby greatly increased,—then it was defendant’s duty to have taken proper precautions to prevent any such increased injury to plaintiffs’ property ; and if the jury are satisfied by the evidence that proper precautions would have prevented such injury to plaintiff’s property, and that plaintiffs’ property has sustained damage by the increase of the quantity of water which found its way to their lots, and from the accelerated flow of the water, in consequence of the defendant’s failure to take such precautions, then the plaintiffs are entitled to recover for the damages so sustained.

“3. If the jury believe from the evidence that the plaintiffs owned lots Nos. 9 and 10, at the foot of Moulton street in the city of Montgomery, and gave notice to the defendant that they wished to improve said lots by building a wall along the line of their lots, and that they desired the defendant to protect their property by improving and

taking care of Moulton street ; and that, after such notice, a reasonable time was allowed to have protected said lots before plaintiffs commenced their improvements ; and that plaintiffs then erected a wall on the line of their lots on Moulton street ; and that no sufficient passage for the water which flowed down Moulton street was left along the wall on Moulton street ; and that a sufficient passage for the water would have been afforded by working for a few hours on Moulton street ; and that this work could have been done by the city hands in two hours ; and that they failed to do such work, and, by such failure, the plaintiffs' wall was washed down,—then the plaintiffs are entitled to recover the damage sustained by the washing down of their wall, if the city council recognized and assumed authority on Moulton street.

“4. If the jury believe from the evidence that the plaintiffs owned lots Nos. 9 and 10 in the city of Montgomery ; and that said lots were bounded on one side by Moulton street ; and that a ravine existed in Moulton street, along the side of said lots, and on the said lots, through which a large quantity of water was conducted to the river ; and that the quantity of water so conducted through said ravine, was materially increased by the action of the city council, in diverting water into said ravine which was not naturally used to flow through it ; and that the quantity of water so conducted through said ravine, was further materially increased, by facilitating its flow into said ravine, by the building and digging of ditches, gutters, boxes and sewers ; and that the water so increased in quantity, by the means aforesaid, could have been safely conducted to the river, without injury to the plaintiffs, by boxing and grading said ravine at the foot of Moulton street, in said street ; and that plaintiffs gave notice to defendant, that they wished to improve their lots by building a wall for a warehouse along the line of said lots on Moulton street, and requested defendant to protect said lots from the flow of water along said ravine ; and that plaintiffs, after a reasonable time had elapsed since the notice to enable the defendant to take proper precaution to protect the wall, did build a wall along the line of

Moulton street, and built it in a skillful manner, with brick and hydraulic cement, so as to make it resist the action of the water as well as possible; and that the defendant failed and neglected to take such precautions, and, by means of such failure, the plaintiffs' wall was washed down, and the soil washed away from their lots,—then the plaintiffs are entitled to recover the amount of the damage sustained by the washing down of their wall, and by the washing away of the soil, if the jury further believe that the defendant recognized Moulton street along the line of said lots as a street.

“5. If the jury believe from the evidence that said street has been repaired since the damage, it is evidence which they may consider in determining whether it could not have been repaired before.”

The defendant excepted to each of these charges, and then requested the following written charges:

“1. That if the jury believe from the evidence, that all the water which was diverted by the defendant into the ravine in controversy, was diverted about the year 1842; and that the plaintiffs did not become the owners of the property injured until 1850,—then the plaintiffs cannot recover for such original diversion.

“2. That the plaintiffs cannot recover in this case for the defendant's negligence in permitting the water to flow into said ravine.

“3. That if the jury believe from the evidence that it was impracticable for the defendant to repair said ravine, without the concurrence and co-operation of the plaintiffs in said work, and that the plaintiffs did not offer to co-operate with the defendant in said repairs before the damage sued for was done,—then the plaintiffs cannot recover on account of the defendant's failure to repair said ravine.

“4. That if the jury believe from the evidence that the plaintiffs built their wall partly across said ravine, and near to the opposite bank of it, and thereby caused the current to be forced against the opposite bank; and that the same was undermined, and washed down, and fell against said wall, and, in falling, knocked down the said wall,—then the plaintiffs could not recover.”

The court gave the first charge, but with this qualification: "That the plaintiffs would be entitled to recover, if damage was sustained, if such diversion was negligently continued by the defendant after plaintiffs became the owners of said lots in 1850;" and refused all the others. The defendant reserved exceptions to the refusal of each one of these charges, and to the qualification added by the court to the first charge given.

The errors now assigned embrace all the rulings of the court below, adverse to the defendant, on the pleadings and evidence, and in the instructions to the jury.

BAINES & NESMITH, and WATTS, JUDGE & JACKSON, for the appellant, contended—

1. That the former opinion of the supreme court pronounced in this case, as reported in 26 Ala. 665, was conclusive of all the points now presented by the record, whether raised on the pleadings or in the instructions to the jury, except so far as the case might be affected by the two additional facts disclosed on the second trial—to-wit, that the ravine had been repaired at a heavy expense since the commencement of this suit, and that the defendant recognized the ravine as a part of Moulton street. As to the duty of the corporation to repair the ravine under the circumstances in proof, and its liability for the damage complained of, they cited the following cases: *Smoot v. Mayor of Wetumpka*, 24 Ala. 121; *Wilson v. Mayor of New York*, 1 Denio, 596; *St. Louis v. Gurno*, 12 Missouri, 414; *People v. Adsit*, 2 Hill, 619; *People v. Commissioners, &c.*, 7 Wendell, 474; *Barker v. Loomis*, 6 Hill, 463.

2. That the court erred in the admission of evidence showing the motives which influenced the action of individual members of the city council, or the feelings entertained by them towards one of the plaintiffs.—*Angell & Ames on Corporations*, 249–521; 3 Phil. Ev. (Notes) part I, p. 393, and cases cited.

3. That the opinion of the brick-mason, as to the sufficiency of the water which fell within plaintiffs' wall to wash it down, was not competent evidence; because, 1st,

he was not an expert as to the matter on which he gave his opinion; and, 2dly, it was not competent to prove such a fact by opinion.—*Hartford Ins. Co. v. Harmer*, 2 Ohio St. R. 452.

ELMORE & YANCEY, *contra*, cited the following cases:

1. As to the duty of municipal corporations to repair streets, and their liability for damages caused by a neglect of that duty, as well as for the negligence of its officers and agents generally: *Mayor v. Furze*, 3 Hill, 612; *Martin v. Mayor*, 1 Hill, 545; *Riddle v. Proprietors, &c.*, 7 Mass. 184; *Mayor of Lynn v. Henley*, 1 Bing. N. C. 373, (27 E. C. L. 366;) *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. City of Boston*, 19 Pick. 511; *Townsend v. Susquehanna Turnpike Co.*, 6 Johns. 90; *Mears v. Commissioners of Wilmington*, 9 Iredell, 73; *Akron v. McComb*, 18 Ohio, 229; *Bailey v. Mayor, &c.*, 3 Hill, 538; *Hay v. Cohoes Company*, 3 Barbour, 42; *Steele v. Western Land Nav. Co.*, 2 Johns. 283; *Matthews v. Water-Works Company*, 3 Camp. 403; *Rochester White Lead Co. v. City of Rochester*, 3 Comstock, 463; *Rhodes v. City of Cleveland*, 10 Ohio, 159; 18 Ohio, 233; *Cowper*, 86; 1 Ad. & El. 526, (28 E. C. L. 40;) 4 Camp. 72; 5 La. 461; 2 Denio, 433.

2. As to the admissibility of evidence showing what took place at the meeting of the city council: *Goodloe v. City of Cincinnati*, 4 Ohio, 504; *Rhodes v. City of Cincinnati*, 10 Ohio, 160; *McComb v. Akron*, 15 Ohio, 474; S. C., 18 Ohio, 229.

3. That the brick-mason was competent to give his opinion as an expert: 1 Greenl. Ev. §§ 440, 576, 580, and cases cited.

WALKER, J.—The first count of the declaration alleges, that the corporation wrongfully and unjustly erected a sewer and gutter, for the purpose of conducting the water through and from certain streets; and that the erection was made in such a careless, negligent and improper manner, that by reason thereof large quantities of water flowed upon and damaged the plaintiffs' neighbor-

ing lots. Notwithstanding there is some conflict of authority upon the subject, we think the doctrine, that a municipal corporation, in the construction of sewers, acts ministerially, and is responsible for damages caused by the careless and negligent manner in which it discharges that duty, is consistent with reason, demanded by justice, and supported by a preponderance of authority. We therefore adopt it.—Rochester White Lead Co. v. City of Rochester, 3 Comstock, 463; Lloyd v. Mayor and Aldermen of New York, 1 Selden, 369; Delmonico v. Mayor, &c., of New York, 1 Sandf. Sup. Ct. R. 222; Mears v. Commissioners of Wilmington, 9 Iredell, 73; Mayor of New York v. Furze, 3 Hill, 612; Smoot v. Mayor of Wetumpka, 24 Ala. 112; Dargan v. Mayor and Aldermen of Mobile, 31 Ala. 469, where several cases bearing upon the question are collated. It necessarily results from the adoption by us of this doctrine, that we must approve the action of the court below in overruling the demurrer to the first count.

[2.] The court erred in overruling the demurrer to the second count of the declaration. The object of that count was the recovery of damages for the defendant's *wrongful* suffering and permitting the water to flow from the sewers on the street upon the plaintiffs' lots. If the defendant did *wrongfully* permit the water to flow from its sewers upon the plaintiffs' lots, and thus cause damage, the plaintiff has a right of action. But, whether the allowing of the water to flow from the sewers upon the land of plaintiffs was wrongful, is a question of law. The facts being ascertained, it is a question of law whether it was the duty of the corporation to prevent the flow of the water upon the plaintiffs' lots, or whether it committed a wrong upon the plaintiffs in permitting the water so to flow. It was not sufficient for the plaintiffs to aver the conclusion of law. They should have set forth the facts from which that conclusion is deducible.—McKeagg v. Collehan, 13 Ala. 828; Clay v. Dennis, 3 Ala. 375; Giles v. Williams, 3 Ala. 316; Savage & Darrington v. Walshe & Emanuel, 26 Ala. 619; Nelson v. Iverson, 24 Ala. 9.

[3.] The third count is obnoxious to a similar objection with the second. The averment of this count is, that the defendant wrongfully and unjustly permitted the adjacent street to remain out of repair, and wrongfully and unjustly refused to repair the same, and wrongfully and unjustly suffered a large quantity of rain-water to run down the street which was out of repair, to, in, against and upon the plaintiffs' lots, and thereby caused the plaintiffs' brick wall to be undermined and to fall, and other specified damage to be done. This count does not attribute the damage done to the neglected condition of the street, either directly or indirectly. It does not show that the neglected condition of the street was the immediate cause of the damage, or the cause of the flow of rain down the street, to, in, against and upon the plaintiffs' lot. It was a duty of the corporation, devolved upon it by its charter, to keep the street in repair, and the third count shows a breach of that duty; but it fails to show a right of action in the plaintiffs, as a consequence of that breach of duty, because it does not appear from the declaration that damage resulted to the plaintiffs from that breach of duty. If it were shown to have been a legal duty of the corporation to have prevented the flow of the rain-water down the street, to, in, against and upon the plaintiffs' lots, then the plaintiffs might recover the damages caused by such flow of water. We attach no importance to the qualification of suffering the water to flow as it did, by the words "wrongfully and unjustly," because whether the failure to prevent such flow of water was wrongful and unjust is a question of law. It is not, *prima facie*, the legal duty of a municipal corporation to prevent the flow of rain-water from the streets upon the adjacent lands, for the omission of which an action may be maintained. It is unquestionably a duty, which it owes to its community, to adopt a judicious system of drainage, whereby the water falling upon the city may be conducted with as little detriment as possible. But this, like the duties of making and enforcing proper quarantine and sanitary regulations, is a legislative duty, embraced in the general obligation to provide for the general welfare of its people,

and must be left, like other governmental powers, to the discretion of the corporate authorities.—*Smoot v. Mayor of Wetumpka*, 24 Ala. 112.

If there are any circumstances in this case which render the corporation responsible for the flow of the water, and the damage done thereby, they are not shown in the count under consideration, and the demurrer should have been sustained to it.

[4.] The plaintiffs were permitted to prove that, at a regular meeting of the city council, some of the members expressed themselves as willing to repair the ravine, if the plaintiffs would give up certain wharf privileges, which they were claiming. This evidence was illegal. The motives which may have induced any member of the corporation to withhold his support from a proposition to make the repairs upon the street, was a matter wholly immaterial and irrelevant. The plaintiffs had no right to recover vindictive damages. No question of vindictive damages was involved in the case. It was competent to prove that the corporation refused, or failed, when informed of the condition of the street, to repair it. Such evidence tended to establish the fact of negligence. But the plaintiffs' right of action in no wise depended upon the motive of the refusal to support a proposition to repair on the part of any one of its members. For the same reason, the court erred in admitting evidence of the remarks of one of the aldermen indicating the existence of unkind feelings on his part towards one of the plaintiffs. If it had been proved that every member of the council was actuated by malice, it would have been entitled to no influence whatever upon this case. The corporation can not, upon any principle known to us, be responsible for the malice of its officers towards the plaintiffs.—*Wright v. Wilcox*, 19 Wendell, 343. If the Ohio cases, cited by the counsel for the appellee, assert the proposition, that a corporation is liable for the malicious motives which may have induced the members of its legislative assembly to decline the adoption of the resolutions or ordinances necessary to the performance of a duty imposed upon it by law, we are not willing to follow them. The court

also erred in admitting the witness who was mayor in 1851 to prove that he would have been willing to have repaired the ravine, if plaintiffs would have given up the wharf privileges claimed by them.

[5.] It was permissible for the plaintiffs to show, that the corporation was, at a meeting of its council, informed through a report by one of its committees of the fact that some slight repairs were made upon the ravine in the street. The making of such a report to the council by the committee was a part of its proceedings, conducing to show a recognition of the street as one of the streets of the city; and, at all events, the evidence was admissible, for the purpose of showing that the corporation was informed of the character of the repair of the street, which the plaintiffs contended was totally insufficient.

[6.] The evidence conduced to show, that the wall of plaintiffs was built with a view to its capacity to resist the flow of water. The witness whose opinion was given as to the capacity of the wall to withstand the flow of water from the inside, was a practical brick-mason, and had been engaged in the construction. He was, therefore, cognizant of the facts, which affected the capacity of the wall to stand, when a stream of water flowed upon it. He was also acquainted with the premises, and knew the sources for the accumulation of a volume of water within the wall. A brick-mason, thus informed, certainly must be deemed to have more than ordinary skill in the determination of the question, whether the water flowing from the inside could wash down the wall. A brick-mason must be supposed to possess more skill in determining the strength of a brick wall than persons usually have, especially if he was employed in the construction of the wall. The authorities, we think, fully authorize the conclusion, that the opinion of the witness was admissible under the circumstances, as coming from an expert.—1 Greenleaf on Evidence, § 440; McCreary v. Turk, 29 Ala. 244; Porter v. Pequonnoc Man. Co., 17 Conn. 249.

[7.] The two charges given by the court of its own motion were not excepted to until after the jury retired. There are many authorities which hold, that an exception to the

charge of the court may be taken at any time before the jury return their verdict; but we adopt the rule that the exception must be taken before the jury leave the bar, because it is supported by respectable authorities, has been for a long time universally recognized in practice in this State, and seems to rest upon a good reason. The reason is, that the court may have, at the time of giving the charge, an opportunity "for reconsidering and explaining it more fully to the jury."—*Phelps v. Mayor*, 15 Howard (U. S.) R. 160; *Leigh v. Hodges*, 3 Scam. 15; *Hill v. Ward*, 2 Gilman, (Ill.) 285; *Wilson v. Owens*, 7 Howard, (Miss.) 126; *Life and Fire Insurance Co. v. Mechanics' Fire Insurance Co.*, 7 Wend. 31. The two charges given by the court of its own motion, are, therefore, not before us for revision.

[8.] The first, second, and fourth charges given upon the plaintiffs' request, authorize a finding by the jury upon a state of facts, which the evidence set forth in the bill of exceptions contained in the record when this case was before in this court, conduced to prove. The tendency of the evidence found in the record of this cause when previously in this court, was to show that the corporation had diverted water from its accustomed and natural flow, and so conducted it as to throw it upon the plaintiffs' lots, making no provision for its outlet without detriment to the plaintiffs, who had thereby sustained damage. It would have involved a violation of principle, not now disputable, for the court to have assumed the reverse of those facts, and prohibited to the jury the inference of them, if there was the slightest tendency of the evidence to their establishment. This court, by its former decision in this case, authorized the application to the evidence then before it of a charge, that the jury, if crediting the testimony, should find for the defendant. We cannot affirm of that decision, that it was predicated upon an erroneous assumption of fact, for it was not the province of the court to pass upon the facts, but to leave them with all their tendencies to the arbitrament of the jury. The former decision must, therefore, be understood to assert, that no state of facts which the evidence con-

duced to show authorized a verdict for the plaintiffs. As the evidence did conduce to show the state of facts presented in the hypothesis of the first, second and fourth charges, that decision must be understood as denying the right of recovery upon those facts, and consequently as adjudicating against the correctness of such charges.

The decision on the former appeal cannot be regarded in the light of a mere *dictum*, but as a comprehensive adjudication, dispensing by virtue of its conclusive effect upon the case presented with the necessity of considering separately the questions arising upon the different aspects of the case. It is the law of this case, whether right or wrong, and we cannot now revise it.—Matthews, Finley & Co. v. Sands, 29 Ala. 136.

The first, second and fourth charges given upon the request of the plaintiffs, are inconsistent with the decision on the former appeal, and are, therefore, erroneous.

Upon the same principle, the demurrer to the 5th count should have been sustained. The averments of that count make out the same case substantially with the hypothesis presented in the first, second and fourth charges.

So, also, the evidence on the former appeal conduced to show the facts averred in the fourth count. Upon the facts set forth in the former bill of exceptions, it would have been manifestly improper for the court to have assumed the absence of evidence with such tendency, and thus have precluded the jury from passing on them. This (the fourth) count alleges, in substance, that Moulton street was out of repair; that it was permitted for a long time to remain out of repair; that in consequence of the streets so being and remaining out of repair, the rain-water continued to tear up, wash and carry away the soil, dirt and earth of the street, and enlarge the space thus made in length, width and depth, until finally a brick wall, erected on the plaintiffs' line for the protection of their lots from the rain-water, was thereby undermined and washed down, and other described damage done. The right of the plaintiff to recover upon those facts depends upon the question, whether the corporation is responsible to adjacent land proprietors for injuries result-

ing to their lands from the omission of the corporation to repair and keep in repair the street upon which such lands are situated. There was certainly sufficient evidence before the court on the former trial to raise that question; and the decision, that upon the evidence the plaintiffs could not recover, necessarily involves an adjudication of that question in the negative.

The court also erred in giving the third charge requested by plaintiffs. This charge, in effect, asserts the legal proposition, that the corporation, within a reasonable time after notification of the owner's design to build upon unimproved lots, is required to prevent any flow of water, which would be detrimental to the contemplated erection. Its sequence would be, that if there was an accustomed and natural flow of water from the street upon the unimproved lot of an adjacent proprietor, that it would be the duty of the corporation to prevent it, whenever it might be notified of the design to make an erection to which such flow would be prejudicial. The imposition of that duty would require the performance, not only of such acts as would keep the streets in repair, but of such as would also improve the adjacent lots, and cure natural deficiencies in them. The corporation would thus be made the obligated conservators and improvers of private property. The duty prescribed by the charter of keeping the streets in repair does not exact the performance of such acts as are necessary to protect adjacent lands from a natural flow of water, or to cure a natural fault of such lands. It follows, that if the land proprietor makes an erection in a position to be injured by a natural and accustomed flow of the water, his damages are attributable to his own act, and not to a breach of duty by the corporation.

It may be contended, that it is a legal duty of the corporation to repair the street, *as a street*; that if the corporation had discharged that duty, it would have diverted the water, and thus incidentally protected the plaintiffs' property, and that the plaintiffs may therefore recover. The third charge does not raise that question; but, if it did, we should be bound to hold, as we have done in refer-

ence to the demurrer to the fourth count, that it was decided against the plaintiffs on the former appeal.

It is possible that the mind of the court was not directed, when the former appeal was tried, to all the points which are now pressed upon our attention, and that therefore the decision has really a wider scope than was intended. For that reason, we should not hesitate, in another case, where we would not be shackled by the rule which makes a decision the law of the case in which it is made, to re-examine the question involved in that decision. We forbear to do so now, because the chief-justice does not sit in this case, and whatever we might say would indicate the position of only a part of the court, and could be but an expression of our opinions upon questions not before us.

What we have said disposes of all the material points of the case, and will be sufficient to guide the court on a future trial.

The judgment of the court below is reversed, and the cause remanded.

RICE, C. J., not sitting.

THOMAS *vs.* STERNS.

[BILL IN EQUITY BY JUDGMENT CREDITOR AGAINST PERSONAL REPRESENTATIVE OF DEBTOR'S ADMINISTRATOR.]

1. *Conclusiveness of judgment.*—A judgment against the administrator *de bonis non* of a deceased debtor, is no evidence of the debt as against the personal representative of the deceased administrator in chief.
2. *When creditor's bill lies.*—A creditor, having an unproductive judgment against the administrator *de bonis non* of his deceased debtor, cannot come into equity, to reach assets of the debtor's estate in the hands of the personal representative of the deceased administrator in chief, against whom a decree has been previously rendered by the orphans' court in favor of the debtor's distributees, which decree has been paid.
3. *Validity of decree of orphans' court.*—A decree of the orphans' court, under the act of 1845, (Session Acts 1844-5, p. 167,) directing the "administra-

Thomas v. Sterns.

tor of J. T., who was the administrator of W. T.,” to pay to the respective distributees of W. T.’s estate the amount found due to them, is not void for uncertainty, but is amendable by other parts of the record, where the name of the administrator is stated, and will be considered amended accordingly.

APPEAL from the Chancery Court at Claiborne.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by the appellants, on the 21st September, 1849, and sought to reach assets in the hands of the defendant, Henry F. Sterns, as the administrator of William Thomas, deceased, who was the administrator in chief of Joseph Thomas, deceased, and to have such assets subjected to the satisfaction of several judgments at law, which the complainants had obtained against George Stonum, as the administrator *de bonis non* of said Joseph Thomas. Its material allegations were, that said Joseph Thomas died in 1841, having in his hands moneys belonging to the complainants, which he had previously collected for them; that William Thomas administered on his estate, from 1841 to 1844, and received a large amount of assets belonging to said estate, which were duly returned in his inventory to the orphans’ court; that complainants’ claims were duly presented to said administrator, within eighteen months after his appointment and qualification, and he repeatedly promised to pay them; that said administrator died in 1844, without having made a final settlement of his accounts, and without having paid the complainants’ claims; that letters of administration on his estate were granted to his widow, Mrs. Emily Thomas, and to the defendant, Henry F. Sterns; that Mrs. Thomas was only nominally administratrix, while Sterns received all the assets of the estate, and transacted all the business of the administration; that said Sterns also received, as such administrator, about \$9,000 of assets belonging to the estate of said Joseph Thomas, which he has kept separate and apart from the assets of said William’s estate, and has never legally disposed of; that on the 11th June, 1845, George Stonum was appointed administrator *de bonis non* of said Joseph’s estate; that complainants instituted suits against

said Stonum, on account of their demands against said Joseph's estate, and recovered judgments against him, as such administrator, at the fall term of the circuit court of Conecuh, 1847; that said Stonum received no assets belonging to said Joseph's estate, and, for that reason, "no executions on said judgments have or could have issued against him, and said judgments remain wholly unsatisfied;" that said Sterns, as the administrator of William Thomas, had notice of complainants' said demands and judgments, and promised to pay them out of the assets in his hands belonging to the estate of said Joseph, on the production of proof by the complainants, but, on the production of proper proof, failed and refused to pay, &c. The prayer of the bill was, that said Sterns might, on the final hearing of the cause, be decreed to pay to the complainants the judgments recovered by them out of the funds in his hands belonging to the estate of said Joseph Thomas.

The defendant Sterns answered the bill, denying that the complainants' claim was presented to said William Thomas within eighteen months after his appointment as administrator; denying, also, that he had received any assets belonging to the estate of Joseph Thomas, and that he had not legally disposed of all the assets which had come to his hands belonging to the estate of William Thomas; and alleging that, prior to the filing of the bill, he had made a final settlement of his intestate's administration on the estate of Joseph Thomas, and had paid the decrees then rendered against him. Appended to this answer as an exhibit was a transcript of the proceedings of the orphans' court in the matter of the two estates of Joseph and William Thomas, showing that Sterns, as the administrator of William Thomas, made a final settlement of his intestate's administration on the estate of Joseph Thomas on the third Monday in June, 1846, and that decrees were rendered against him in favor of the several distributees of said Joseph's estate.

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

WATTS, JUDGE & JACKSON, for the appellants.—1. The act of 1845 makes the administrator of a deceased administrator or executor liable to account to the creditors, legatees or distributees of the first intestate or testator, or to his administrator *de bonis non*, to the extent of the assets which come to his hands, belonging to the estate of the first decedent. In other words, to the extent of the assets in his hands, he is the administrator of the estate of the first decedent: he is *quasi* administrator *de bonis non*, and, as such, is required to account to the same extent, and by the same rules which govern executors or administrators.

2. An administrator cannot, in reply to a suit by a creditor, plead that he has settled with the orphans' court, and had the funds distributed among the heirs.—Dean v. Portis, 11 Ala. 104; Thrash v. Sumwalt, 5 Ala. 13. Does Sterns occupy a better position than an administrator of Joseph Thomas would? Independent of the statute of 1845, he would be considered a trustee, holding the funds of Joseph Thomas' estate subject to the rights of the parties therein interested; that is, creditors first, and distributees afterwards.

3. The complainants' judgments against Stonum, as the administrator *de bonis non* of Joseph Thomas, are conclusive against the estate of said Thomas, and, consequently, must be conclusive against all persons who hold the assets of that estate. There can be no doubt that such judgments would be conclusive against all subsequent administrators of Joseph Thomas. Sterns, so far as the assets in his hands are concerned, stands in the shoes of the estate, and, independent of the act of 1845, is concluded by the judgments as to their validity and amounts. If this be held doubtful, it insisted that the act of 1845, in effect, makes him, *de jure*, an administrator of Joseph Thomas. In the aspect most favorable to him, the statute makes him an ancillary administrator, and liable to account to creditors, legatees, distributees, or to the administrator *de bonis non*. He is bound by any judgment or act which would bind the administrator in chief.—Starke v. Keenan, 5 Ala. 590; Mahorner v. Har-

rison, 14 Ala. Rep. 834; 10 Pick. 77; 8 Pick. 476; 11 Mass. 264.

4. The only question which Sterns can make in this suit, is, whether the assets belonging to the estate of Joseph Thomas, which are shown to be in his hands, have been by him legally disposed of and paid as against these complainants. The questions of non-claim, statute of limitations, and payment by Joseph Thomas, and everything else arising before the renditions of the judgments, are concluded by the judgments.

5. Independent of the act of 1845, the administrator of an administrator could not be made to account, at law, for the assets of the first estate; but the creditors or distributees were obliged to resort directly to chancery. 3 Ala. 670. Nor was he responsible to the administrator *de bonis non*.—2 Porter, 550; 11 Ala. 872. The representative of an executor or administrator is liable directly to creditors.—*Draughn v. French*, 4 Porter, 352, and cases cited from 5 Randolph. Sterns stands in the attitude of a trustee for the creditors of the estate of Joseph Thomas. He holds a fund belonging to that estate, which the creditors cannot reach at law, and to which they are equitably entitled. The source from which the assets were derived cannot affect the question.

6. If the assets had legally gone into the hands of the distributees of the estate of Joseph Thomas, it would have been necessary to make them parties defendants. But, when the bill was filed, the assets were in the hands of Sterns; they have never gone out of his hands; and there is no valid decree requiring him to pay them over to the distributees.—*Story's Equity Plead.* § 140, note 3; 2 Peters, 377; 1 Johns. Ch. 437; *Lawson v. Barker*, 1 Bro. C. C.

7. The decree of the orphans' court, in favor of the heirs of Joseph Thomas, is against no one; consequently, it is void, and no execution could have issued on it against Sterns.—*Joseph v. Joseph*, 5 Ala. 280.

F. S. BLOUNT, *contra*.—1. The judgments recovered by the complainants against George Stonum, as the admin-

istrator *de bonis non* of Joseph Thomas, are not evidence against the personal representatives or heirs of William Thomas. There is no privity between the parties. The law did not require the presentation of the claims against Joseph to the administrator of William Thomas, and such presentation was not sufficient to charge the estate of Joseph in the hands of his administrator. If presented to William in his lifetime as administrator of Joseph, it was the duty of the complainants to have sued him at law, or to have followed up such presentation by attending at the settlements of the administrators before the orphans' court. Courts of equity administer no relief to the careless and negligent.

2. There is no evidence showing that either Sterns or Mrs. Thomas ever had any notice or knowledge of the presentation of the claims to William in his lifetime; nor does the record contain any evidence of their presentation to Sterns and Mrs. Thomas, as administrators of William, before final settlement.

3. The act of 1845 limits the liability of the administrators of administrators, &c., "to the assets that may come into their hands of the first estate." The jurisdiction is conferred on the orphans' court, and to that tribunal the complainants ought to have resorted. The jurisdiction conferred on the orphans' court was exclusive; and the chancery court never entertains jurisdiction, where legislative authority has established a competent tribunal to meet the particular case.

4. The complainants' judgments against Stonum are not evidence to charge the heirs of William Thomas. *Darrington v. Borland*, 3 Porter, 9; *Heydenfeldt v. Towns*, 27 Ala. 429.

STONE, J.—We do not, in this case, propose to determine whether, under the pleadings, the defense of non-claim can be entertained in favor William Thomas, the first administrator. Nor do we, in this case, decide whether Sterns, the administrator of William Thomas, can rely on the failure of complainants to present the claim to him.

As we understand this record, we feel it our duty to consider the case in two aspects. First, whether there is any privity between Stonum and Sterns, so as to make the judgments of complainants against Stonum, evidence of the debts as against Sterns.

In *Rogers v. Grannis*, 20 Ala. 247, it was held, that a judgment against an administrator in chief was no evidence against the administrator *de bonis non*, of the justness of the demand. We can perceive no foundation on which to rest a distinction, which, while it denies to a judgment against the administrator in chief all effect as evidence against the administrator *de bonis non*, will accord to a judgment against the administrator *de bonis non* the dignity of evidence against the administrator in chief, or his personal representative.

In the case of *Wenrick v. McMurdo*, 5 Randolph, 51, 55, the court, in speaking of the office and duties of an administrator *de bonis non*, said: "Between himself and his predecessor there was no privity. His commission gave him power to act, and to represent the testator or intestate, so far (and so far only) as there remained unadministered goods, chattels and credits, which were of the testator or intestate at the time of his death." Speaking of what amounts to an administration, either by the administrator in chief, or the administrator *de bonis non*, the opinion adds: "Both held in *autre droit*; and, therefore, neither could dispose by will of the property remaining in *specie*; but both had the power, while living, of changing, altering, and converting the property; and whatever was thus altered or converted, became their own goods, and descended on their deaths to their own representatives. Such change or conversion of the goods was (so far as regarded the administrator *de bonis non*) a complete administration, and put them as effectually beyond the reach of his commission, as if they had never belonged to the testator or intestate."—See, also, 1 Lomax on Ex'rs, (2d ed.) 548.

The act of 1845 (Pamph. Acts, 167) empowered the orphans' court, in all cases, to bring the administrator, &c., of a deceased administrator to a settlement; and

declared, that such administrator of an administrator should be "liable to account either with the distributees, legatees, creditors, or administrators *de bonis non*, or executor with the will annexed, of his testator's or intestate's testator or intestate."

It is manifest, that the act of 1845 contains nothing which creates a privity between the offices of administrator in chief and administrator *de bonis non*, further than its express provisions extend. It nowhere declares, that a judgment against an administrator *de bonis non* shall be evidence of a debt against the administrator in chief; much less, against the administrator of such administrator. We cannot hold, then, that the suit and recovery against Stonum, the administrator *de bonis non*, was so far a proceeding against Sterns, or the effects of Joseph Thomas in his hands, as that he was bound to retain those effects for the payment of the judgments which the complainants might recover in the suits at law. He, Sterns, was liable to account to the legatees and distributees, as well as to and with creditors; and, without going farther at this time, we think it clear that even notice of the existence of those suits against Stonum, without more, neither cast on him the duty, nor armed him with the power, of arresting or preventing the distribution of the effects of the estate of Joseph Thomas in his hands. If the creditors had instituted proceedings against Sterns, possibly the rule would be different.

Second: It may be contended, that inasmuch as the complainants have unproductive judgments against Stonum, as administrator *de bonis non* of Joseph Thomas, deceased, and Sterns had in his hands effects belonging to said estate, this bill may be entertained as a creditors', or garnishment bill, to reach equitable property. A complete answer to this is found in the fact, that long before this bill was filed, Sterns had come to a settlement, and distributed the effects in his hands. It does not vary the case, that the judgments are, as is alleged, informal, in not naming Sterns personally. The amounts were ascertained, and the "administrator of William Thomas, who was administrator of Joseph Thomas," was directed to

pay them. The record shows, that Sterns was the person designated; and under the authority of *Smith v. Redus*, 9 Ala. 99, such defect is amendable, and will be considered as amended. It is not necessary to go further in this case.

Decree affirmed.

POOL'S HEIRS vs. POOL'S EXECUTOR.

[CONTEST AS TO VALIDITY OF WILL.]

1. *Cross examination of witness.*—A witness may be asked, on cross examination, “if he was not then under the influence of ardent spirits.”
2. *Relevancy of evidence affecting question of undue influence.*—Where one of the issues is, whether the will propounded for probate was procured by undue influence; and evidence has been adduced tending to show that one of the slaves whom the testator directed to be carried to a non-slaveholding State and there emancipated, making her one of his legatees, had influence over him, and a motive to exercise it in procuring such a will,—it is competent for the proponent to prove who was the reputed father of said slave, and that her reputed father had given the testator, on his removal to this State, fifteen or twenty likely negroes.
3. *What constitutes undue influence.*—A legal presumption of undue influence does not arise from the facts, that the testator was a man of weak mind, and addicted to drinking; that he was “nigh unto death” when the will was executed; that he was surrounded by the persons who were principally benefited by the will, while none of his own relations were about him, and that the provisions of the will were unnatural; although the jury may not be prohibited from inferring undue influence from those circumstances.

APPEAL from the Probate Court of Dallas.

IN the matter of the last will and testament of Ephraim Pool, deceased, which was propounded for probate by George L. Stewart, the executor therein named. The record does not show by whom the probate was contested, nor what the grounds of contest were. The bill of exceptions is so confused, (and many portions of it illegible,) that it is impossible to state the substance of the evidence adduced on the trial. The material portions

relating to the points here decided may be briefly stated as follows:

Dr. Tanner, who was one of the testator's attending physicians at the time of his death, was examined as a witness by the proponent, "and testified in a clear, distinct and intelligent manner." "On cross examination, the defendants' counsel asked him, if he was not then under the influence of ardent spirits. The witness replied, that the counsel had no right to ask that question, and appealed to the court; and the court decided that the question was improper and illegal; to which ruling of the court the defendants excepted."

The testator's will directed his executor to carry certain slaves (to-wit, Harriet, a mulatto woman, and several children of another woman, who were principally raised by her, and whose father the testator appears to have been) to Ohio, for the purpose of emancipation, and to invest in a bank for their benefit the entire proceeds arising from the sale of all his property. "It was admitted that one Canty, an absent witness, would swear that he knew said Pool and the woman Harriet, and would state circumstances showing that Harriet had influence over Pool; one of which circumstances was, that Pool became jealous of a negro man who was running after one of his women, and carried his gun about with him, and declared his intention to shoot him; that Canty went to Harriet, and requested her to get Pool to abandon the idea; and that he heard nothing more about the matter.

The plaintiff objected to the competency of this evidence; but the court allowed the circumstances named to be given in evidence, and excluded the circumstances named; to which ruling and decision the defendants excepted." R. K. Harrison testified, among other things, "that he had known Pool intimately for about sixteen years; that he brought the woman Harriet with him to Alabama; that Harriet was the reputed daughter of Richard B. Harrison, deceased, who gave Pool, after his removal to Alabama, fifteen or twenty likely negroes; that Pool had them eight or ten years, working them, and, after Harrison's death, delivered them to his administrator. The defendants objected

to the question as to who was the reputed father of Harriet, and also to the statement that R. B. Harrison had given Pool fifteen or twenty negroes; but the court overruled the objection, and the defendants excepted."

The contestants asked the court to instruct the jury,—

"1. That if they believed from the evidence that Pool was a man of weak mind, and had been addicted to drinking, and occasionally to excess; and that he was nigh unto death at the time he signed the will; and that the will is unnatural in its provisions; and that he was surrounded by the persons who are principally benefited by the will, and none of his own relatives were about him,—that then the law presumes that the will was procured by undue influence and —, and it devolves upon the plaintiff to show that no undue influence was exerted.

"2. That if they believed from the evidence that the will is unnatural, and that the testator was nigh unto death, the law presumes undue influence on the part of the persons benefited by the will, if they had an opportunity to exercise such influence, and it devolves on the plaintiff to show clearly that no such influence was exerted over the testator."

The court refused each of these charges, and the contestants excepted; and they now assign as error all the rulings of the court to which they reserved exceptions.

BYRD & MORGAN, for the appellants.

GEO. W. GAYLE, *contra*.

RICE, C. J.—However "clear, distinct and intelligent" may have been the manner in which Dr. Tanner testified, he was the witness of the plaintiff, and his testimony on his direct examination was material; and beyond doubt, it was the right of the defendants, *on cross examination*, to ask him if he was not then "under the influence of ardent spirits." "His powers of discernment, memory, and description," were proper matters for the consideration of the jury, whose duty it was to determine the just weight and value of his testimony; and if he was under the influence of ardent spirits at the time he was

testifying, it was proper that the jury should know it. There appears to us no sound reason for denying to the defendants, *on cross examination*, the right to put the question to him.—1 Greenleaf on Evidence, §§ 446, 448, 449; *Campbell v. The State*, 23 Ala. R. 44; *Williamson v. Stoudenmire*, 29 Ala. R. 558; *McHugh v. The State*, at last term; *Young v. Smith*, 25 Missouri R. 341.

[2.] It seems that one of the questions in this case was, whether the will was obtained by undue influence. In the determination of such a question, great latitude is of necessity given to the evidence.—*Gilbert v. Gilbert*, 22 Ala. R. 529. After some evidence had been adduced, tending to show that Harriet had influence over the testator, and a motive to exercise it to procure such a will as that here propounded for probate, we cannot say that it was erroneous to admit the evidence, that “Harriet was the reputed daughter of Richard B. Harrison; and, after Pool’s removal to Alabama, Harrison gave Pool 15 or 20 likely negroes.” That evidence may be exceedingly weak, and may, perhaps, be entirely deprived of effect, by the evidence that, after the death of Harrison, Pool delivered back the negroes to Harrison’s administrator; but, however that may be, the evidence was rightly allowed to go to the jury for what it is worth.

[3.] We think the propositions asserted in the charges asked, were rather too strong. *The law* does not presume undue influence from the facts supposed in those charges, although it may not prohibit the jury from inferring it from such facts. The question of undue influence in obtaining a will is one eminently fit for the determination of a jury; and if we were to sustain the charges as asked in this case, we should thereby interfere too much with that freedom of investigation which the law wisely allows to the jury in all such cases as the present.

As the question in relation to Cauty’s testimony will probably not be presented in the same shape on another trial, we decline to decide it.

The question raised in this court, as to the validity of *some* of the legacies, does not appear to have been raised in the court below, either by the pleadings or charges.

We therefore decline to consider it, especially as it is not even contended, that every provision in the will is void, and that no part of it can in any event be admitted to probate.—See *Florey v. Florey*, 24 Ala. R. 241; *Ingraham v. Thrasher*, 32 Ala. Rep. 645; *Hooper v. Hooper*, 32 Ala. R. 669.

For the error of the court below on the first point considered in this opinion, the judgment is reversed, and the cause remanded.

SALTONSTALL AND WIFE *vs.* GORDON.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT ON GROUND OF FRAUD.]

1. *When failure to disclose facts constitutes fraud.*—In the absence of any fiduciary relation between the parties, the purchaser is not bound to disclose to the vendor any material fact within his knowledge, unless he knows or has reason to presume that the latter is ignorant of that fact; nor does his failure to disclose such facts constitute a fraud, against which equity will grant relief.
2. *Same.*—The purchaser is not bound to disclose to his vendor, in buying the latter's title to a tract of land claimed by both under conflicting titles, the fact that he had already sold the land, or the price which he had obtained for it; nor is his failure to disclose those facts fraudulent.
3. *When misrepresentation constitutes fraud.*—Where it appears that both parties claimed title to a tract of land; and that the complainant's agent, after having employed an experienced attorney to investigate the facts connected with their conflicting claims, proposed a compromise, which the defendant accepted,—the assertions of the latter, respecting the validity of his title, are the mere expression of an opinion, which could not have misled the complainant, or induced him to enter into the contract, and do not constitute a fraud.
4. *Inadequacy of consideration no ground of rescission.*—Mere inadequacy of consideration, in the absence of other circumstances, is not sufficient to induce a court of equity to rescind a contract, unless the inadequacy is so great as to shock the conscience and amount to conclusive evidence of fraud.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by the appellants, Seneca A. Saltonstall and Louisa, his wife, against Archibald W. Gordon and Richard H. Redwood. Its object was, to obtain the rescission of a contract, by which Mrs. Saltonstall, then an infant and unmarried, transferred to the defendant Gordon, by a quit-claim deed, her interest and title in and to a certain lot in the city of Mobile, of which said Gordon was then in possession, and to which he claimed title; the defendant Redwood acting as the complainant's agent in the transaction, and being joined as a party on an allegation of fraudulent combination with his co-defendant. A rescission of the contract was sought on the grounds of fraud and inadequacy of consideration; the alleged fraud consisting in the defendant's misrepresentation and concealment of material facts within his knowledge, respecting the title and value of the land. The defendants filed separate answers, denying the allegations of fraud, and stating the circumstances under which the contract was made; and the defendant Gordon further insisted, that his title to the land, at the time of the contract, was superior to that of the complainant, and that she in fact had no title. On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

R. EVANS, for the appellants.

E. S. DARGAN, *contra*.

WALKER, J.—The entire claim to relief in this case rests upon the allegation of fraud in the purchase by the defendant Gordon of a certain lot in the city of Mobile. The fraud is said to have been perpetrated by a failure to disclose and a misrepresentation of facts affecting the value of the land, whereby the vendor was induced to sell for less than the value of the property.

Chancellor Kent, in the 2d volume of his Commentaries, page 482, defines the obligation of disclosure imposed upon contracting parties as follows: "Each party is bound to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them,

and they be not open and naked, and equally within the reach of his observation." In a note to the later editions of that work, the rule as laid down is admitted to be too broad, and it is subjected to this qualification, that the party in possession of the facts must be under some special obligation, by confidence reposed or otherwise, to communicate them truly and fairly. In Story's Equity Jurisprudence, the undue concealment which amounts to a fraud, in the sense of a court of equity, is defined to be the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiae*, but *juris et jure*, to know.—1 Story's Equity, § 207. These definitions, not differing materially from each other, have been approved and adopted in this State.—Camp v. Camp, 2 Ala. 636; Steele v. Kinkle & Lehr, 3 Ala. 357; Moore v. Clay, 7 Ala. 742; Juzan v. Toulmin, 9 Ala. 684; Van Arsdale v. Howard, 5 Ala. 596; Kennedy v. Kennedy, 2 Ala. 593; see, also, 1 White & Tudor's Leading Cases, 141.

It would be alike inconsistent with those authorities and with reason, to pronounce an omission to disclose any material fact fraudulent, unless the ignorance of that fact on the part of the other contracting party was known, or unless there was reason to presume it. There can be no obligation to communicate facts to a party, not known to be uninformed as to those facts, or presumable to be so uninformed.

The chief fact of which an undue concealment is charged, is the tenancy of the defendant Gordon under the complainant's guardian. If such tenancy ever existed, the failure to disclose it cannot justify the imputation of fraud. It does not appear that Mrs. Saltonstall was ignorant of the fact that such tenancy had existed, or, if she was, that Gordon knew of such ignorance. At the time when the tenancy is alleged to have commenced, Mrs. Saltonstall was about fifteen years of age, and resided in Mobile, with her step-mother, who knew of the tenancy if it existed. She left Mobile, in 1829, at the age of about sixteen years, and continued to reside with her step-

mother and guardian, who says she received rent from defendant, through her husband. In March, 1834, a few months before Mrs. Saltonstall attained majority, her step-mother and former guardian was in Mobile, and conversed with her as to the compromise with the defendant, which was then contemplated, as to the doubt of her right which was expressed. From these facts the complainant's ignorance of the tenancy, if it ever existed, is not inferrible, and scarcely probable. They certainly leave us no room for the conclusion, that the defendant knew, or had reason to believe, that Mrs. Saltonstall was ignorant in that particular. There being no proof of the defendant's knowledge of any want of information on the complainant's part, we can predicate no conclusion of fraud upon his omission to disclose.

[2. The defendant was under no obligation to disclose the fact that he had sold the land, or the price at which he had sold. It is not perceived that a knowledge of the price at which the sale was made would have affected the complainant's determination as to selling. It is not at all certain that she was uninformed as to those matters. The possession of the purchasers was at least sufficient to put her upon inquiry. But, aside from those considerations, it is impossible to conclude, that Gordon was under any obligation, or had any reason to regard himself as under any obligation, to make a disclosure of circumstances affecting the value of the land. In the absence of such obligation, and of everything like trust or confidence, an omission to disclose an extrinsic circumstance of that character, which might tend to affect the vendor's estimate of the value of the property, is not fraudulent. 1 Story's Eq. Jur. § 207.

[3.] No misrepresentation of matters of fact is proved to have been made by the defendant, Gordon. He asserted title to the lot in himself, in the communication which he had with defendant Redwood, acting for Mrs. Saltonstall. But it does not appear that he either concealed or misrepresented the facts upon which the validity of his title depended. It is certain that he believed, with some degree of confidence, that his title was superior to that of

the complainant. Which was the better title, was a matter of judgment. There seems to have been no misrepresentation of the facts relied upon to sustain the title of either party. It is clear, too, that the complainant neither relied upon, nor was induced to sell by, any representation of Gordon. There was never any communication between them upon the subject. There appears to have been a single interview between Redwood, who was acting for the complainant, and Gordon; and certainly no false assertions are proved to have been then made. Redwood, with the approval of the complainant, judiciously commenced his agency for the complainant by employing an eminent and reputable lawyer to investigate the location and title of the land. He made no move, until the lawyer had discharged that duty and reported the result. Then Redwood made proposals for compromise with Gordon. He acted under the advice of the lawyer, and manifestly was influenced by the conclusions attained by the lawyer in his investigation of the facts and the law. He did not permit Gordon or his attorney to communicate with him. He acted, too, with the consent and approval of the complainant. It is thus most apparent, that no representations by Gordon constituted a material inducement to the sale. The assertion by Gordon of a claim to the land does not appear to have misled the complainant, and involved no misrepresentation of fact; but it was a mere matter of judgment, as to which neither party can be supposed to have been influenced by the other. From such assertion no deduction of fraud can be drawn.—1 Story's Equity, §§ 191, 192, 195, 197, 208; *Stow v. Bozeman*, 29 Ala. 397.

[4.] Inadequacy of consideration is not, of itself, a ground of relief by a vendor against a vendee. It certainly can become a ground of relief, only when it is so gross as to "shock the conscience, and amount in itself to conclusive and decisive evidence of fraud."—1 Story's Equity Jur. §§ 244, 245, 246; *Bozeman v. Draughan*, 3 St. 243; *Juzan v. Toulman*, 9 Ala. 662; *Eaton v. Patterson*, 2 St. & P. 9; *Judge v. Wilkins*, 19 Ala. R. 765. When it is considered that the complainant's title was

not only doubtful, but was pronounced to be extremely doubtful by an able and distinguished lawyer, against whom there is no evidence of fraud or unfairness, and who investigated it for her, it is impossible, under the proof, to regard the price paid as so inadequate as to carry with it decisive evidence of fraud.

We find no ground of relief against the defendant Redwood, who acted as the friend and guardian of Mrs. Saltonstall. As far as we can learn from the pleadings and evidence, his conduct was fair, free from guile and deceit, and directed to the single purpose of promoting the complainant's interest.

The decree of the chancellor is affirmed.

WHITMAN vs. ABERNATHY.

[BILL IN EQUITY BY FEME COVERT, FOR RECOVERY OF SLAVES BELONGING TO SEPARATE ESTATE, AND REMOVAL OF HUSBAND AS TRUSTEE.]

1. *Conveyance of wife's separate estate.*—A bill of sale for a slave belonging to the wife's separate estate, executed by husband and wife, attested by only one witness, and not shown to be under seal, is not sufficient, under the provisions either of the Code or of the act of 1850, to pass the title of the wife when a minor.
2. *When wife may come into equity.*—A married woman, having a separate estate created by law, may come into equity to have her husband removed from the trusteeship of her estate, and to recover property which he has disposed of without authority.
3. *Multifariousness.*—A bill filed by a married woman, seeking to recover property belonging to her separate estate, which her husband had sold without authority, and to remove him from the trusteeship of her estate, is not multifarious.
4. *Rents and profits of wife's separate estate.*—When a married woman files a bill for the recovery of property belonging to her separate estate under the act of 1850, which has been sold by her husband without authority, and for the removal of her husband as her trustee, she is not entitled to a decree for the hire accruing before the order for the husband's removal as trustee.
5. *Purchaser's liability for loss of property.*—Under such a bill, the purchaser from the husband, or a sub-purchaser, is liable to the wife for the value of a slave who died in his possession pending the suit.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Mrs. Isabella Abernathy, suing by her next friend, against Meredith B. Abernathy, her husband, and James K. Whitman; and sought to recover certain slaves, which the complainant claimed as a part of her separate estate, and which were in the possession of the defendant Whitman, and to have her husband removed from the trusteeship of her separate estate. The facts of the case, as disclosed by the pleadings and proof, are these: The complainant's marriage with her said husband took place on the 1st April, 1852; she being at that time a minor, and possessed of several slaves, which she inherited from the estate of her deceased father, and which were in the hands of her guardian. These slaves, soon after the said marriage, went into the possession of her husband, who, in January or February, 1853, (the precise time is not shown,) sold them to one George C. Tillman, and executed to him a bill of sale for them, in which Mrs. Abernathy joined, and which was attested by one witness; and Tillman afterwards sold them to Whitman. One of said negroes died in Whitman's possession, after the commencement of this suit, Abernathy, the complainant's husband, after squandering most of her property, became a fugitive from justice, traveled from place to place under an assumed name, and abandoned her. The defendant Whitman answered the bill; denying its allegations on information and belief; insisting that the sale to Tillman was valid, and that he himself was entitled to protection as an innocent purchaser for value; and demurring to the bill for want of equity, for multifariousness, and for misjoinder of defendants. Decrees *pro confesso* were entered against Abernathy and Tillman. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant; removing her husband from the office of trustee, and enjoining him from interfering with her property; ordering Whitman to deliver to her all the slaves which remained in his possession, and charging him with the value of the

one which had died; and ordering a reference to the master, to ascertain the hire of the slaves from the filing of the original bill. The decree of the chancellor is now assigned as error.

THOS. WILLIAMS, for the appellant, made these points :

1. The bill is without equity, because the complainant had an adequate remedy at law.—Code, § 2131; *Gerald and Wife v. McKenzie*, 27 Ala. 166; *Pickens and Wife v. Oliver*, 29 Ala. 528.

2. The conveyance of the slaves by husband and wife, if not in accordance with the requisitions of the statute, was sufficient to pass the title as against the wife, under the act of 1850, or under the Code. The deed is lost, and the proof does not show the exact time when it was executed. Construing the allegation of the bill, that the sale took place "early in January, 1853," most strongly against the complainant, she must be held to aver that the conveyance is governed by the act of 1850, which was not superseded by the Code until the 17th January, 1853. Under that statute, husband and wife may sell the property of the wife, and convey it by their "joint deed;" and the deed is required to be "executed, proved and recorded in accordance with the requirements of the laws now in force regulating conveyances of real estate." This conveyance was attested by but one witness, and was not proved and recorded. But the statute does not declare a conveyance void, in favor of the grantors, on account of the failure to comply with these requisitions: its object evidently was to give notice to strangers, and not to enable the parties themselves to avoid their deliberate act on account of a mere informality in the attestation or registration. If the Code applies to the case, it is supposed that the conveyance is invalid because not attested by two witnesses. But it is to be observed, that the Code does not declare the conveyance void, if attested by but one witness, nor does it say that the wife's property shall not be disposed of in any other way than by deed attested by two witnesses. The statute provides one valid mode of conveyance, but does not prohibit others; nor is there

any thing in it to prevent the application of the principle already cited, respecting the validity of deeds *inter partes*, notwithstanding the informality of their execution.

3. The infancy of the complainant, at the time of the sale, is not available to her in avoidance of the deed. Neither the act of 1850, nor the Code, in authorizing conveyances of the wife's property by deed of husband and wife, contains any exception as to infants. The statutes apply to a class—to married women generally—and an exception not warranted by their terms cannot be engrafted upon them. It is to be presumed, that the legislature supposed the husband would exercise a controlling influence, which would be a sufficient protection against any indiscretion on the part of the wife if under age. Aside from the statutes, at common law, the contract of an infant was voidable only, and not absolutely void; and he was required to disaffirm it within a reasonable time after attaining his majority.—Manning v. Johnson, 26 Ala. 457; 7 Cowen, 173; Thomas v. Boyd, 13 Ala. 419; Lawson v. Lovejoy, 8 Greenl. 405; 1 Dana, 45; 8 Cowen, 84; 8 Texas, 417; 2 Stewart, 498; Smith v. Evans, 5 Humph. 70; Weaver v. Jones, 24 Ala. 420; 3 Har. & McH. 128; 9 Vesey, 478; 3 Edw. Ch. 222; 2 Barbour, 586; 8 Geo. 341; 6 B. Monroe, 40; 11 B. Monroe, 113; 11 Paige, 107; 2 Rich. Eq. 120; 1 Swan, (Tenn.) 437; 9 B. Monroe, 454; 3 Sandf. Ch. 431; 15 Mass. 359. The authorities above cited show that the complainant, if she has not waived her right to avoid the contract on account of her infancy, certainly does not place herself in a position to obtain equitable relief against it.

4. There is no proof of fraud, coercion, or inadequacy of consideration in the sale. It appears to have been the complainant's voluntary act, and she received the full value of the property in exchange. Whitman is entitled to protection, as an innocent purchaser for valuable consideration without notice.—Anderson v. Roberts, 18 Johns. 515; 3 Edw. Ch. 222; 2 Rich. Eq. 120; Jarrard v. Saunders, 2 Vesey, 457; 1 Story's Eq. §§ 64, 108, 154, 165, 381, 409, 416, 434–36.

5. The complainant was certainly not entitled to a

decree for the hire of slaves from the filing of the bill. Until the husband was removed from the office of trustee, he was entitled to the rents, income and profits of the wife's separate estate.

6. Whitman is not liable for the value of the slave who died in his possession. He does not occupy the position of a wrongdoer, and cannot be charged as for a tortious conversion.

WATTS, JUDGE & JACKSON, and J. F. CLEMENTS, *contra*, contended,—

1. That the bill of sale did not pass the complainant's title to the slaves, because it did not conform to the requisitions of the statute, whether tested by the act of 1850 or by the Code; and that the statute was restrictive of the right of disposition. To this point they cited the following cases: Calhoun v. Calhoun, 2 Strob. Eq. 231; Wyll v. Collins, 9 Geo. 237; 12 Geo. 195; 4 Texas, 65; 5 Texas, 152; Johnston v. Jones, 12 B. Monroe, 326; 8 Leigh, 20-27; Boykin v. Rain, 28 Ala. 332.

2. That the complainant's infancy was, of itself, a sufficient reason for setting aside the sale.—Manning v. Johnson, 26 Ala. 446; 5 Johns. Ch. 464; 3 Paige, 117; 2 Litt. 157; 2 Rich. 148; 26 Miss. 352; 7 Dana, 506; 5 Sm. & Mar. 216; 9 N. H. 444.

3. That the question of innocent purchaser or not did not arise, and that Whitman was chargeable with the notice which Tillman had.—Garrison v. Fisher, 26 Miss. Rep. 352.

4. That the bill contained equity.—Bridges & Co. v. Phillips, 25 Ala. 136; Cole v. Varner, 31 Ala. —; Waldron, Isley & Co. v. Simmons, 28 Ala. 629.

5. That the complainant was entitled to a decree for the hire of the slaves from the filing of the bill; that the wrongful act of the husband, on which the complainant founded her claim to relief, deprived him of the right to the rents and profits of her separate estate accruing from that time; that the complainant's right was perfect at the filing of the bill, otherwise she could have obtained no relief at all; and that the husband could not claim the

rents and profits accruing after the filing of the bill, which sought to remove him from the office of trustee.

STONE, J.—It is not rendered necessary, by anything in this record, that we should determine whether a married woman who is a minor, and who has a separate estate created by law, can unite with her husband in a joint deed, and thus convey a valid title to her property. Neither is it necessary to determine whether the failure to prove and record such deed, “in accordance with the requirements of the laws now in force regulating conveyances of real estate,” invalidates such title. Nor do we now determine whether an adult married woman, having a separate estate created by law, can convey such estate in any other manner than that provided by the act of 1850, § 5, and the Code, § 1984.

The conveyance relied on this case, was executed by Mrs. Abernathy when she was a minor. It is not clearly shown whether the bill of sale was executed before or after January 17, 1853, the time when the Code went into operation. The testimony of Miss Tilman leads us to the conclusion, that it was before the 17th January, 1853, and hence must be governed by the act of 1850.—See *Durden and Wife v. McWilliams & Smith*, 31 Ala. 438. Whether governed by the act of 1850 or by the Code, the conveyance in this case would be alike invalid. However the law in regard to adult married women may be, we are satisfied that minors can only make a binding conveyance of their separate property, if indeed they can make such binding conveyance, by conforming substantially to the requirements of the law.

The act of 1850 empowers husband and wife to convey away her separate property, by their joint deed.—Pamph. Acts, 64. There is neither an averment nor proof in this case that the conveyance was by deed. The Code (§ 1984) permits husband and wife to convey the property of the wife, jointly, by instrument of writing, attested by *two* witnesses. The bill of sale in this case had but one witness.

[2-3.] The objection that the complainant in this case

had an adequate remedy at law, and that her bill is multifarious, cannot be sustained. If she had sued at law, under section 2131 of the Code, the property, when recovered, would have gone into the control and possession of her husband, as her trustee, who would have been entitled to the rents, income and profits. To give her adequate relief, it was necessary to have her husband and faithless trustee removed. This rendered a resort to chancery necessary, and proves the propriety of joining Mr. Abernathy as a party defendant, and also proves the propriety of seeking and obtaining relief against each defendant.

[4.] In one particular, the decree of the chancellor must be reversed. The complainant has no claim for the hire and profit of the labor of the slaves which accrued before the decree removing her husband from the trusteeship of her property.—Act of 1850, § 4. Her claim for maintenance pending the litigation is not presented by this record. It is not necessary in this case to announce, nor do we announce, what would be our opinion on the right of the wife to recover hire, if in this case the chancellor had, pending the suit, enjoined Mr. Abernathy from intermeddling with the property, under section 1996 of the Code. The bill being filed after the Code went into operation, the rights of Mrs. Abernathy, in this connection, are probably governed by the Code.—§ 1997; *Durden and Wife v. McWilliams & Smith*, 31 Ala. 438. No such order was made in this case; and, of course, the question does not arise. No injunction having issued against the husband, enjoining him from intermeddling with the estate, her right to the hire depends on the order removing him as trustee, under sections 1994 and 1995 of the Code. The complainant, having herself no right to the hire or profits of the labor of the slaves, cannot recover the same, although Whitman may have had no right to them.

[5.] We hold there was no error in ordering the defendant to pay for the slave Scott, who died pending the litigation. This right rests on the following principle: Although Mr. Abernathy, up to the time of his removal, was the

trustee of Mrs. Abernathy's separate estate, and as such entitled to the rents, income and profits of the same without liability to account therefor; yet, as such trustee, he had no authority to sell the trust property. The sale made by him was a breach of the trust, and conferred no right on Mr. Whitman to possess and enjoy the property. Having no right to the property, he is accountable for injury or loss of the property in his hands, as any other tortious or wrongful holder would be. Unlike the question of hire, Mrs. Abernathy's right to the *corpus* of the property was all the time complete; and hence her right to recover for the slave which died in Whitman's hands.

The decree of the chancellor, so far as it directs an account of the hire of the slaves from the filing of the bill, is reversed. In all other respects it is affirmed. Let the costs of the appeal be paid by complainant's next friend.

MAY vs. HEWITT, NORTON & CO.

[ACTION AGAINST OWNER OF STEAMBOAT, ON BILL OF EXCHANGE DRAWN BY
CLERK, AND ACCEPTED BY CAPTAIN.]

1. *Admissibility of parol evidence to explain acceptance of bill.*—In an action against the owner of a steamboat, seeking to charge him as the acceptor of a bill of exchange, which was drawn by the clerk on the owner, and accepted by the captain, if it is doubtful from the face of the bill whether the acceptance imports a personal liability on the captain, parol evidence is admissible to show that such acceptance was intended to bind the owner, and that he authorized it to be made in that name and form.
2. *Liability of owner of steamboat on acceptance of bill by captain.*—If the owner of a steamboat, on whom a bill is drawn by the clerk, addressed to "the owner of steamboat M.," authorizes the captain to accept for him, by writing his own name, with the addition of the word "captain," across the face of the bill; and the acceptance is made by the captain in that name and form,—such acceptance is binding on the owner.
3. *Implied admission.*—A conversation between the plaintiff's agent and the defendant, relative to the bill of exchange on which the latter was sought to be charged as acceptor, under an acceptance by another as his agent;

in which conversation, the defendant did not deny his liability on the acceptance, but asserted that a third person, to whom he had sold the steamboat, ought to pay a part of the amount, because the bill was drawn on account of the insurance of the boat, and the policy was unexpired at the time the boat was sold,—is competent evidence against the defendant, as an implied admission of his liability on the acceptance.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. JOHN E. MOORE.

THE complaint in this case was in these words :

<p>“Hewitt, Norton & Co. <i>vs.</i> James T. May.</p>	}	<p>The plaintiffs claim of the defendant the sum of four hun- dred and fifty-one dollars, with interest thereon, for that whereas, heretofore, to-wit, on the 11th November, 1852, said defendant was the owner of a steamboat called the <i>Messenger</i>, and one Frank Bell was the clerk, and B. W. Bell the captain thereof, and also agent of the defendant; and that said B. W. Bell, as such agent, was authorized by said defendant to accept in the name of B. W. Bell, as captain, for said defendant, owner of said steamboat, and on his account, the draft hereinafter described; and that, being so authorized, the said B. W. Bell, as such agent, and for and on account of said defendant, did then and there accept a draft, or bill of exchange, by writing across the face of it thus, ‘B. W. Bell, capt.,’ drawn on the day and year aforesaid, by said Frank Bell, clerk of said boat, addressed to the defend- ant, owner thereof, by the description, ‘To the owners of S. B. <i>Messenger</i>,’ (meaning of the steamboat <i>Messenger</i> aforesaid,) for the sum of four hundred and fifty-one dol- lars, payable nine months after the date thereof, at the counting-house of May & Van Hook in New Orleans, to the order of R. Burge, president of the Falls-City Insur- ance Company, by whom said draft was endorsed to plaintiffs; which draft still remains unpaid.</p>
---	---	---

“And for that whereas, also, heretofore, to-wit, on the 11th November, 1852, the said defendant, by B. W. Bell, his agent, thereunto lawfully authorized, and captain of a steamboat called the *Messenger*, whereof said defendant was the owner, accepted another draft, or bill of exchange,

by writing across the face of it thus, 'B. W. Bell, capt.,' drawn on the day and year aforesaid, by Frank Bell, clerk of said boat and keeper of the accounts thereof, and addressed to said defendant, by the description, 'To owners of S. B. *Messenger*,' (meaning thereby the owner of the said steamboat *Messenger*,) for the sum of four hundred and fifty-one dollars, payable nine months after the date thereof, at the counting-house of May & Van Hook in New Orleans, to the order of R. Burge, president of the Falls-City Insurance Company, and by him endorsed to the plaintiffs; which draft is still unpaid."

The defendant demurred to the complaint, "in short by consent," on the following grounds: "1st, that it is not alleged that the bill was drawn on the defendant by name, or accepted in his name, but was accepted in the name of 'B. W. Bell, capt.;" and, 2d, that it does not show a legal liability of the defendant." The demurrer having been overruled, the defendant filed the following pleas, "in short by consent:" "1st, he denies all the allegations of the complaint; 2d, he says he did not accept the bills of exchange, or either of them, mentioned in the complaint, in the manner and form therein alleged; and, 3d, he denies that said B. W. Bell was authorized by him to accept said bills of exchange, or either of them." An affidavit to the second and third pleas was waived, and issue was joined on all of them.

On the trial, as appears from the bill of exceptions, the plaintiffs introduced one Thomas Adams as a witness, who testified as follows: "That the defendant, in November, 1852, was the owner of the steamboat *Messenger*, which was then at Louisville, Kentucky; that Frank Bell was then the clerk of said boat, and B. W. Bell captain; that the signature of the drawer of the bill sued on was in the handwriting of said Frank Bell, and the acceptance in the handwriting of B. W. Bell; that said boat was built under their superintendence, during the summer and fall of 1852, at Louisville, Kentucky, for the defendant; that the Falls-City Insurance Company was an insurance company at Louisville, accustomed to insure boats; that said bill, after its maturity and non-payment, was

sent by the holder to witness and his late brother, who were merchants in partnership in Mobile, to be placed in the hands of an attorney for suit; that it was received during his absence, by his brother, since deceased, and placed in the hands of an attorney for collection; that witness and his brother were grocery-merchants in Mobile, and had been steamboat-captains; that defendant, after he was sued, had frequent conversations with him about it, in which he said that Capt. J. J. Cox ought to pay a part of the claim, because it was given for the insurance of said steamboat, which he had sold to said Cox before the policy was out; that he told witness, that he had had a conversation with witness' brother, and had informed him of the same thing; that defendant further said, it would be unjust to make him pay the whole; that witness then informed him, that they had received the claim only as agents for collection, and had no authority to settle it by compromise; that defendant did not, in any of these conversations, say that he had not given Capt. Bell authority to accept the draft for him, or that he had no authority, but only objected to paying the whole of the claim, because, as he said, Cox ought to pay a part of it for the reason stated; that he did not say he had given Bell authority to accept for him; that the bill was not present, and nothing was said about Bell's authority to accept it or not. Said witness further testified, that the *Messenger* was sold by the defendant to Cox in the spring of 1853."

"No other witness was examined on either side, and no other was offered to prove any authority from the defendant to B. W. Bell to accept said bill. The plaintiffs then offered to read said bill in evidence to the jury. The defendant moved to exclude it from the jury, on the ground that said evidence was not competent and sufficient in law to go to the jury, to show that the defendant authorized said Bell to accept said bill. The court overruled the objection, and allowed the bill to be read in evidence to the jury; to which the defendant excepted. Said bill was as follows:

"Exchange for \$451. Louisville, Ky., Nov. 11, 1852.

Nine months after date of this my first of exchange, (second unpaid,) pay to the order of R. Burge, president Falls-City Insurance Company, four hundred and fifty-one dollars, value received, payable at the counting-house of May & Van Hook, New Orleans.

"FRANK BELL, Clerk.

"To Owners of S. B. *Messenger*, New Orleans."

Acceptance endorsed: "B. W. Bell, Capt."

"This being all the evidence, the plaintiffs asked the court to charge the jury as follows: 'That if they believed from the evidence that the defendant, after the claim was sent by plaintiffs to the Messrs. Adams for collection, and again while suit was pending on it against him, had conversations with the Messrs. Adams in reference to said bill, in which he never denied the authority of Bell to accept the draft for him, but, admitting that he ought to pay a part of it, asserted that Cox ought to pay the balance, because said boat was sold to him before the policy of insurance expired,—this is lawful evidence, as an admission by defendant that Bell was authorized to accept the bill. The court gave this charge, and the defendant excepted.

"The court, however, further charged the jury, that the conversations detailed by Adams were not sufficient evidence of an admission by the defendant of authority in Bell to accept for him, unless, with a full knowledge of all the facts and circumstances, he ratified or recognized the act of Bell in accepting the bill as his act; and that an admission by defendant that he was bound to pay a part of the premium of insurance on the boat, would not be an admission that Bell was authorized to accept said bill for him."

The errors now assigned are, the overruling of the demurrer to the complaint, the admission of the bill in evidence, and the charge given at the instance of the plaintiffs.

WM. G. JONES, for the appellant.

A. R. MANNING, *contra*.

RICE, C. J.—When it is doubtful from the face of a contract, not *under seal*, whether it was intended to operate as the personal engagement of the party signing, or to impose an obligation upon some third person as his principal, parol evidence is admissible to show the true character of the transaction; especially, if the right of a *bona-fide* endorsee is not prejudiced thereby.—Lazarus v. Shearer, 2 Ala. 718; Deshler v. Hodges, 3 Ala. 509; McWhorter v. Lewis, 4 Ala. 198; Mott v. Hicks, 1 Cowen, 513.

That principle is applicable to the contract here sued on, as the same is described in the first count of the complaint. For, conceding that the acceptance, unexplained by evidence *aliunde*, imports, *prima facie*, a personal liability against B. W. Bell; yet enough appears from an inspection of the bill, the direction thereof, and the acceptance, to create some doubt as to that liability, and to justify the admission of parol evidence to show that the acceptance was intended to bind the defendant, that he authorized it to be made in that name and form, and that it does in fact bind him. The cases above cited, from our own reports, compel us to that conclusion, unless we overrule them; and we are not prepared to do that. See Trueman v. Loder, 11 Ad. & Ellis, 589; Collyer on Partn. § 408–410, *et seq.*

[2.] It is a necessary result from the principle recognized in those cases, that the plaintiff was authorized to set forth in his complaint the bill and acceptance, and, in connection therewith, to allege the existence of such facts as would show that the defendant was bound by the acceptance. The plaintiff was authorized to aver whatever he was authorized to prove. And if all the averments and matters set forth in the first count of the complaint are true, the defendant is liable on the acceptance. As the bill was directed to the owner of the steamboat, and the defendant was the owner, and authorized the acceptance to be made for him, in the name and form in which it was made, he is liable upon it.—Edwards on Bills and Notes, 81–83, and notes; Mott v. Hicks,

1 Cowen, 513; Trueman v. Loder, *supra*; Collyer on Part. *supra*.

If the suit here had been by a *bona-fide* endorsee without notice, against B. W. Bell, to enforce the personal liability against him which appears *prima facie* from the face of the instrument unaccompanied with explanation, then, perhaps, the rule that when a person has authority, as agent, to accept a bill for another, he must do it in such a manner as to show that it is the act of his principal, might prevent B. W. Bell from exonerating himself from personal liability. That rule is mainly designed for the protection of payees and *bona-fide* endorsees, who have no other notice of the transaction than such as is disclosed upon the very face of the instrument itself; and, of course, cannot be applied strictly between the parties to the present suit—the *endorsee* of the bill, and the *principal*, for whom the acceptance was really made by his authorized agent, in the authorized name and form.

As the first count of the complaint is good, and the demurrer was to the whole complaint, there was no error in overruling the demurrer, even if the second count be defective; but as to that count we decide nothing.

[3.] It appears from the bill of exceptions, that the charge excepted to was accompanied by another bearing on the same subject; the latter being consistent with, and explanatory of the former. We must, therefore, construe the charge excepted to in connection with that other, and with the evidence.—Barber v. Brace, 3 Conn. Rep. 9. Thus construing it, we understand it to assert, that if the defendant, both before and after suit brought, had the conversations referred to in the charge, with the Messrs. Adams, “*in reference to the bill sued on;*” and if the tenor of those conversations was such as supposed in the charge, then the failure of the defendant, in those conversations, to deny Bell’s authority to accept the bill for him, and his assertion that Cox ought to pay a part of the bill for a single specific reason, (to-wit, “because, before the policy of insurance expired, the steamboat *Messenger* was sold to him,” Cox,) was *evidence* as an admission of defendant that Bell was authorized to accept the bill. The

charge does not assert that it was either *sufficient* or *conclusive* evidence, but simply that it was *lawful* evidence; and we think it entirely defensible.—Wheat v. Croom, 7 Ala. 349; Vail v. Strong, 10 Vt. R. 457.

We are unable to discover any error, and must affirm the judgment.

SMITH vs. GAFFARD.

[SLANDER FOR WORDS SPOKEN OF UNMARRIED FEMALE.]

1. *Admissibility of evidence showing sense in which words were understood by hearers.*—Where the words charged in the declaration are not, *per se*, actionable, and are not averred to have been intended to impute a slander, or to have been so understood by the hearers, the plaintiff cannot be permitted to prove the sense in which they were understood by the hearers, so as to convert them into a slanderous charge.
2. *Admissibility of evidence in explanation of admission.*—Plaintiff having proved an admission by defendant of what he had said, in a conversation between his brother and himself, relative to the plaintiff, it is competent for the defendant, in rebuttal of any inference of malice from the words used by him, to prove what he did actually say in the conversation with his brother, and the circumstances under which it was said.
3. *Presumption in favor of ruling of primary court.*—Where the admissibility of evidence depends upon the other evidence then before the court, and the bill of exceptions does not show whether, at the time it was admitted, the other evidence which authorized its admission was before the court or had been excluded, the appellate court will make that intendment which may be necessary to sustain the ruling of the primary court.
4. *Responsiveness of answer to interrogatory.*—In answer to an interrogatory, calling on the witness to state, if he heard a particular conversation relative to the plaintiff, “how it occurred, and what it was, and who were present,” an answer in these words, “I have no recollection at this time of the plaintiff’s name being mentioned in the conversation had on that day,” although not full and satisfactory, is responsive to the interrogatory.
5. *Liability of next friend for costs.*—In an action brought by an infant, suing by next friend, judgment for costs may be rendered against the next friend, if the plaintiff fails in the suit.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Caroline Smith, an infant suing by her next friend, against James M. Gaffard. The words charged in the complaint were as follows: "Caroline Smith lost a young one, or miscarried; it took place at Jack Smith's, and Mrs. Hawkins was sent for, but it was all over when she got there." "Caroline Smith has lost a young one; Mrs. Hawkins was sent for, but it was all over when she got there." "Mrs. Hawkins told me, that Caroline Smith had lost a young one, and a negro woman found it, and showed it to her." "There was something the matter with Caroline Smith that was pretty bad; it is said she has lost a young one, but there is some little room for doubt whether it is so or not." "Mrs. Hawkins told me, that there was something the matter with Caroline Smith more than common at such times, (meaning the period of menstruation;) she has lost a young one, or there has been an abortion." "Caroline Smith was troubled with milk, and had to come back; they sent her off, but her breasts rose, and they had to bring her back; every thing else was there if the child was not." An amendment of the complaint added the following averment "to the 2d, 3d, 4th and last set of words," to-wit: "And plaintiff avers, that the defendant, by the use of said words, intended to charge, and was understood by the persons who heard them to charge, that the plaintiff had been pregnant with a child, and had miscarried or given birth to it; and she further avers, that she is now, and ever has been, an unmarried female." The defendant pleaded not guilty, and issue was joined on that plea.

"On the trial," as the bill of exceptions states, "the plaintiff introduced one Samuel Matthews as a witness, who testified, that in June, 1856, in company with the plaintiff's father, he went to the house of David W. Gaffard, a brother of the defendant, for the purpose of tracing up some reports about the plaintiff; that he called on the defendant, on the next day, in company with one Robert Perry, and told him that they had called on him about some reports about Caroline Smith; that the defendant did not inquire what the reports were, and nothing

was said in the conversation as to the character of the reports; that he asked defendant if he had not said something about Caroline Smith; that defendant replied, he had not; that witness then asked him, if he had not been at the mill a short time before; that defendant asked, 'What mill? your mill?' that witness answered, 'No, your brother David's mill;' that the defendant, without any further inquiry, and without asking what reports were in circulation, replied, 'Yes, I am glad that you have reminded me of it. I did tell my brother David, that Mrs. Hawkins told me there was something the matter with Caroline Smith more than was common with young women at such times; but I meant no harm by it, and am sorry that anything has grown out of it.' Witness further testified, that the defendant made no inquiry as to what the reports were. Plaintiff's attorney asked him, how he understood the defendant's words; to which he replied, that he understood them to charge that Caroline Smith had miscarried; but, on cross examination, said witness stated, that he did not understand the words, of themselves, to charge plaintiff with a want of chastity. Plaintiff's attorney asked said witness, on re-examination, 'How did you understand the words, taking them in connection with the reports about which you were talking?' The defendant objected to this question, but the court permitted it to be asked; and the witness answered, that he understood the words, in connection with the reports about which they were talking, to mean that Caroline Smith had miscarried. The court afterwards, during the progress of the trial, excluded from the jury the answer of said witness to said question, and instructed them that they must not consider said answer as evidence in the case; to which action and ruling of the court the plaintiff excepted.

"Robert Perry, who was with said Matthews on the occasion referred to, was also introduced as a witness by the plaintiff, and testified, that he understood the defendant at that time to say, that he had told his brother David, that Mrs. Hawkins had told him, that Caroline Smith was in a bad condition, and a great deal worse than young

women usually were at such periods. (Other proof in the case tended to show, that the plaintiff was at that time suffering from an excessive menstrual discharge.) Plaintiff's attorney then asked this witness, what he understood the defendant to mean by the words uttered by him; and the witness replied, that he would not, from the words alone, have understood the defendant to make any charge against the plaintiff's chastity, *but that, taking the words in connection with the reports about which they were talking, he understood the defendant to mean that Caroline Smith had lost a child.*" To the italicized portion of this answer the defendant objected; but the court overruled the objection, and allowed the entire answer to go to the jury as evidence. "In the further progress of the trial, however, the court excluded said answer from the jury as evidence, and the plaintiff excepted."

"After the plaintiff's testimony had closed, the defendant introduced his brother, David W. Gaffard, as a witness, who testified, that he owned a mill in the year 1856, which was about four or five miles from the defendant's house; that he never had any conversation with the defendant at said mill, about the plaintiff, prior to July, 1856; that the defendant, prior to that time, never said anything to him about the plaintiff, except in a conversation which occurred between them, in June, 1856, at the house of their mother, which was about one mile from witness' mill. The defendant then proposed to prove by this witness what he said about the plaintiff in that conversation. To this the plaintiff objected; but the court overruled the objection, and permitted the witness to state what his brother said in that conversation; to which ruling of the court the plaintiff excepted. The witness then testified, that the defendant told him, in said conversation, that Mrs. Hawkins had told him there was something pretty bad the matter with Caroline Smith; and that he understood the defendant to mean that she was very sick, and nothing more. To the admission of this answer the plaintiff excepted."

There were other exceptions to the rulings of the court on the evidence, which require no particular notice.

The jury returned a verdict for the defendant, and the court thereupon rendered judgment for costs against the plaintiff's next friend.

The rendition of the judgment for costs, and the rulings of the court on the evidence, are now assigned as error.

BAINE & NESMITH, with whom was JOHN K. HENRY, for the appellants.

WATTS, JUDGE & JACKSON, *contra*.

WALKER, J.—There was no error in the exclusion by the court of the evidence of the two witnesses, Matthews and Perry, as to the sense in which they understood the words of the defendant, when taken in connection with certain reports. There is a class of cases, which this court has defined in *Robinson v. Drummond*, 24 Ala. Rep. 174, where it is permissible to prove the sense in which the witnesses understood the words spoken.—*Briggs v. Byrd*, 11 Iredell's Law, 553; S. C., 12 *ib.* 377; *Sasser v. Rouse*, 13 *ib.* 142; *Snell v. Snow*, 13 Mete. 278; *Morgan v. Livingston*, 2 Rich. 573; *Gibson v. Williams*, 4 Wend. 320; *Beardsley v. Maynard*, *ib.* 336; S. C., 7 *ib.* 560. If the words proved by the two witnesses bring this within that class of cases, (a point which we do not consider,) nevertheless the evidence was properly excluded, because there was no corresponding averment in the declaration. The words, as averred in the declaration, are innocent. The corresponding words, as proved, are, *per se*, innocent. The plaintiff cannot be permitted to convert into slander by proof words which, as stated in the declaration, are not actionable. If she could, she might recover upon proof without pleading.—*Robinson v. Drummond*, *supra*; *Kirksey v. Fike*, 29 Ala. 206.

[2.] The defendant showed by the testimony of his brother, David Gaffard, that there had been between them only one conversation in relation to the plaintiff, prior to the time when the defendant's admission of what he had said to that brother was proved by Matthews and Perry to have been made. The defendant offered to prove what he did say of the plaintiff in that conversation. After the

ruling of the court in favor of the admissibility, and an exception by the plaintiff, the witness stated, that the defendant said: "Mrs. Hawkins had told him there was something pretty bad the matter with Caroline Smith; and that he understood the defendant to mean, the plaintiff was very sick, and nothing more." To this evidence the plaintiff objected, and, the objection being overruled, excepted. The objection was to the entire evidence. There was no separate objection to the statement by the witness of his understanding as to the meaning of the plaintiff. There was, therefore, no error in overruling the objection to the evidence, if it was admissible so far as it contained the statement of what the defendant said to the witness. Thus far the proof made corresponded with the evidence offered, and the same question is raised by overruling the objection to the evidence proposed, and by overruling the objection to the proof made. By the evidence before the court it was shown, *prima facie*, that the conversation, to which the admission proved by Matthews and Perry referred, and the conversation as to which David Gaffard testified, were the same. This was apparent because there had been but one conversation; and it was a fair inference from the testimony, that the conversation admitted by the defendant to the plaintiff's witnesses, and that proved by the defendant's brother, occurred in June, 1856. The argument of plaintiff's counsel against the identity of the conversations is based upon a misapprehension of the testimony. It does not appear that the conversations occurred at different places. The plaintiff's testimony conduced to show, that the conversation occurred, (not at David Gaffard's mill,) but on an occasion when the defendant went to that mill. The testimony of David Gaffard is, that the conversation was had at his mother's house, about a mile from the mill, which was several miles from the defendant's residence. The conversation may have occurred when the defendant went to his brother's mill, and yet may have been at his mother's house a mile from the mill. The testimony is, therefore, reconcilable with, and does not overturn, the

prima-facie case in favor of the identity of the conversations.

The court, acting upon the *prima-facie* case apparent before it, found that the plaintiff had made proof of a certain conversation, and that the defendant proposed to prove by a different witness what was said in the same conversation. The proof thus proposed was clearly admissible. The circumstances under which the defendant stated what he had said to his brother, and the qualification and explanation accompanying the admission, would prevent the mere fact, that he repeated in the admission the words previously said to his brother, from availing any profitable purpose; but the admission proved opened the door for comment upon what had been said to David Gaffard, as evidence of malice, if not of slander. The defendant, being thus placed in a situation to be affected by the conversation with David Gaffard, was properly allowed to give evidence of what was said in that conversation.

[3.] The bill of exceptions does not disclose whether the testimony of David Gaffard was admitted before or after the exclusion of the testimony of Matthews and Perry as to their understanding of what the defendant had said; and if it were necessary to the affirmance of the judgment, we would make the intendment consistent with the correctness of the ruling of the court, and regard the testimony of Gaffard as given in while that of Matthews and Perry was before the court.

[4.] The court did not err in overruling the motion to exclude that portion of Mary Elizabeth Gaffard's answer to the third interrogatory, in which she said: "I have no recollection at this time of the plaintiff's name being mentioned in the conversation we had on the 3d and 4th of July, 1856." The objection was that the testimony was not responsive to the interrogatory. The interrogatory was as follows: "If there was a conversation on the 3d and 4th of July, 1856, relative to the plaintiff, state how it occurred, and what it was, and who were present." It is true there might possibly have been a conversation relative to the plaintiff, without mention of her name.

But the tendency of the answer was very directly to negative the fact that any conversation on the subject occurred. The answer was, therefore, responsive to the interrogatory, although not so full and satisfactory as might have been desired.

[5.] There was no error in rendering the judgment for costs against the plaintiff's "next friend." The law is so settled in *Perryman v. Burgster*, 6 Porter, 99; see, also, 1 Tidd's Practice, 72.

The judgment of the circuit court is affirmed.

ROGERS vs. BOYD, ADM'R, &c.

[BILL IN EQUITY BY HUSBAND, AGAINST ADMINISTRATOR OF DECEASED WIFE, TO
SUBJECT SEPARATE ESTATE TO PAYMENT OF DEBTS.]

1. *Husband not entitled to reimbursement out of wife's separate estate for debts paid for family supplies.*—If the husband, after the death of the wife, pays debts contracted for family supplies during coverture, which constitute a charge on the wife's separate estate under the act of 1850 and under the Code, he cannot come into equity to be reimbursed out of the *corpus* of such estate, or to be subrogated to the rights which the creditors might have had against it.
2. *Nor to have separate estate subjected to payment of outstanding debts.*—Whatever may be the rights of creditors to subject the wife's separate estate, after her death, to the payment of debts contracted during coverture for family supplies, the surviving husband has no equity to maintain a bill for the purpose of having the *corpus* of her estate subjected to the payment of such debts.
3. *Liability of separate estate for debts contracted during coverture in farming.* The *corpus* of the wife's separate estate cannot be charged during coverture, for debts contracted, with her consent, in carrying on farming operations with her slaves; nor can it be subjected by the husband, after her death, to the payment of such debts.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Simeon Rogers, the appellant, against the administrator of his deceased wife, alleging,

in substance, that he and his deceased wife were married, in Dallas county, Alabama, on the 27th January, 1851; that they lived together as husband and wife, until the 24th May, 1855, when his wife died, intestate, and without issue; that his wife, at the time of their said marriage, was possessed of a considerable personal estate, consisting principally of slaves, which she held as her separate estate under the act of 1848; that these slaves, with other hired hands, were worked and managed by him, up to the time of his wife's death, with her consent and approval, in carrying on farming operations; that the proceeds of the crops were applied to the payment of the rent for the land which was cultivated, and to the support and maintenance of the family; that many debts were contracted during the coverture for necessary articles of family supply, suitable to their condition in life, and for medical attendance on his wife while sick; that these debts were contracted with the assent of his wife, and on the credit of her separate estate, though he sometimes gave his note, as her trustee, for their amounts; that he has paid some of these debts since the death of his wife, and others are now outstanding against him; and that he is unable to pay these outstanding debts. The prayer of the bill was, that as to the debts paid by the complainant since the death of his wife, he might be subrogated to the rights which the creditors would have had to enforce payment out of her separate estate, and might be reimbursed the amount so paid out by him; and that the separate property of the wife might be subjected to the payment of the outstanding debts.

The defendant demurred to the bill, for want of equity, for multifariousness, and for want of proper parties; and in passing on the demurrer, the chancellor delivered the following opinion:

CLARK, Ch.—“The equity of the bill presents for consideration three questions: 1. Can a husband, who, after the death of the wife, has paid debts for which the *corpus* of her separate estate under the statute could have been held liable, have such payments refunded to him out of

such *corpus*? 2. Can he sustain a bill to have the *corpus* of such estate subjected to outstanding debts after her death, for which he and such estate, had the wife been still living, would have been jointly liable? 3. Can the *corpus* of such estate be made liable for debts contracted, even with the consent of the wife, in carrying on a farm with the trust slaves during the existence of the marriage relation?

“1. It is unnecessary to consider what would have been the rights and powers of the husband and wife under the statute of 1848, had not that of 1850 been enacted. Hers are shown by the case of Hooper's Executor v. Smith and Wife, 23 Ala. 639. The right of the wife to act with her property as a *feme sole*, and, consequently, to charge it with her debts *ad libitum*, was, materially abridged by the act of 1850, which was held, in the case of Weems v. Bryan and Wife, 21 Ala. 302, 308, to retroact upon the estate of the wife, so as to entitle the husband to its income. The effect of the legislation of 1850 was, while it allowed the wife the *corpus* of her estate as a separate estate, as the previous enactment had, it deprived her of the power to charge such *corpus*, except for articles of family supply, or to dispose of the same, except by consent of the husband, to whom it gave the entire rents, income and profits as his own, without the same being liable to his debts, or he being called to account to her, her heirs or representatives for such profits; thus disrobing the wife of her power to act with her property as a *feme sole*. The rights and liabilities of the parties under the act of 1850 were not materially changed by the adoption of the Code. Under the statute of 1850, the husband became tenant for the joint lives of himself and wife of the rents, income and profits of the wife's separate estate, unless deprived of them by his misconduct. For what object were they conferred upon him? Certainly not to be used in disregard of the just claims of the wife to be comfortably supported by him from these or other means. This is manifest from the fact, that if he becomes unfit to act as her trustee, he is to be removed, and she herself is then to have the control of the estate, its rents, issues

and profits, as a *feme sole*. The provision, that the estate of the wife shall be liable for articles of family supply, could not have been intended to relieve the husband from the discharge of his common-law obligation to support the family, but to give to the creditor an additional security for these articles, so that, under all circumstances, a comfortable support might be secured to the wife and children upon the faith of her property. It could not have been intended in any way to absolve him from the duties of a husband. He was still to be the head of the family, and still legally bound to provide for all its wants; therefore, when he has discharged a debt contracted for articles of family supply, he has but discharged his own debt, and cannot be subrogated to the rights of the creditor whose debt he has discharged. There can be no subrogation where the debt is a man's own.

"Besides, should a court of chancery undertake to charge the *corpus* of the separate estate, at the instance of the husband, for debts paid by him, it could not avoid calling him to account for the profits of the trust property, notwithstanding the statute declares that he shall not be required to account, because it must require any one who seeks its aid to do equity. The legislature could never have intended to inflict such a monstrous wrong on the wife, as to allow the husband to pocket the profits of her separate estate, and then be subrogated to the position of the creditor whose debt he had paid. The object of the statute is to secure to the wife the specific property. But how can this be effected, if the husband can be allowed to occupy the place of a creditor, and to be reimbursed out of the *corpus* of the property? He has only to let his accounts for family supplies remain unpaid as long as the creditor will consent, and, should the wife die, pay off the creditor, and then pounce down upon the *corpus* of the estate; which would no doubt, in many instances, result in leaving but little to distribute to her next of kin, while his pockets might be well lined from the use of moneys which ought, long before, to have gone to pay off such creditors. That such consequences might flow from allowing the husband to be reimbursed, very conclusively

shows, I think, that the complainant can have no equity to have such reimbursement. That a portion of the payments were for medical attention to the wife, can make no difference: the husband is bound to supply the wife with necessaries, and medical attention is a necessary.

"2. The question, whether the complainant has any equity to have the *corpus* of the separate estate, after the death of the wife, subjected to the payment of outstanding debts for family supplies, must receive a similar decision. If the unpaid creditors have any claim to payment out of the *corpus* of the separate estate, (a question which I need not, and do not, decide,) they must themselves become actors. It would never do to allow a principal to have the aid of a court of chancery, to cast his own liability upon his surety; so it would never do to allow a husband, who is bound by law to support his family, to invoke the aid of a statute for the protection of creditors, to reach the estate of his deceased wife in *execution* of his own liability. In regard to such debts, husband and wife are not *equali jure*. They are *his* debts, and the estate can only be rendered liable at the instance of the creditor; consequently, he is not entitled either to exoneration or to contribution. The joint liability of the husband and wife to a suit at law was intended for the benefit of the creditor; but there it stopped. When the *corpus* of the wife's estate, after her death, has to be invaded to discharge a debt of this character, it is because the law wills it—not because it ought, in equity, to be so applied in exoneration of the husband; and the inauguration of such a policy by courts of chancery would not fail to remove whatever protection was intended by the legislature to be thrown around the property of the wife.

"3. As the wife only has power under the statute to charge the *corpus* of her separate estate for articles of family supply, it follows that she has no right to charge it with the expenses of keeping up a farm. The statute of 1850, while it curtails her power under the act of 1848, must nevertheless be treated as an enabling statute. At common law, she could hold no such estate, nor make any contract which would bind her. But these statutes not

only create the estate, but that of 1850 declares the extent to which she can render it liable; namely, for articles of family supply.—Gibson v. Marquis and Wife, 29 Ala. 668; Davis and Wife v. Foy, 7 Sm. & Mar. 67; Selph v. Howland, 23 Miss. 264; Lillard v. Turner, 16 B. Monroe, 376; Johnston and Wife v. Jones, 12 B. Monroe, 326. For such farming expenses the husband is alone liable. He has a special estate, carved out of the wife's separate estate, which may last for life; and the law is, that the tenant for life must bear the current expenses attendant upon the use and enjoyment of the life estate. Such expenses can no more constitute a charge upon the *corpus* of the estate in remainder or reversion, than a physician's bill for attending upon a hired slave can be a charge against the owner.—See Jones v. Dawson, 19 Ala. 672; Tupper v. Fuller, 7 Rich. Eq. R. 170; U. S. Digest for 1855, p. 552, § 109; Caldecott v. Brown, 2 Hare, 144, and cases there cited; Maynard v. Johnston, 1 Hill's Ch. 109; Redding v. Hall, 1 Bibb, 541; Meeker v. Childress, Minor, 109. Such seems also to be the rule of the civil law, as applied to the usufructuary.—Cushing's Domat, § 997. Consequently, in the present case, neither the complainant nor any creditor can be allowed to charge the *corpus* of the separate estate, even by the consent or desire of the wife, with the expenses of the farming operations carried on by him during the coverture.

“As the bill lacks equity, in any phase in which it can be presented, it is unnecessary to consider the question of multifariousness.”

The chancellor accordingly dismissed the bill, and his decree is now assigned as error.

WATTS, JUDGE & JACKSON, for the appellant.

D. S. TROY, *contra*.

STONE, J.—The present suit was instituted by the husband of the intestate, and, so far as the record discloses, the creditors do not desire to charge their debts upon the estate. Hence, we are not called upon to decide whether they have any, and if any, what rights in refer-

ence to this property. It will be time enough to consider *their* rights, when they invoke their consideration.

Neither are we required, by anything apparent upon this record, to decide how far a married woman, having a separate estate, created either by contract or by law, can by contract fasten a charge upon her separate estate, which courts of equity will enforce in favor of creditors. That subject was under discussion in the cases of Hoot v. Sorrelle, 11 Ala. 386; Baker v. Gregory, 28 Ala. 544; Daniels, Elgin & Co. v. Sprague and Wife, 31 Ala. 444; Gibson v. Marquis and Wife, 29 Ala. 668.

Nor does the complainant in his bill show that he was entitled to have the estate distributed. He alleges no ground for asking a distribution.—Code, § 1821.

Before the act of 1850, if a wife, having a separate estate, permitted her husband to have and use its rents, income and profits, the law presumed she made him a present of them, and he was not liable to account for them.—Roper v. Roper, 29 Ala. 247. The act of 1850 and the Code, by express terms, constituted the husband trustee of the wife's separate estate, and relieved him from liability to account for rents, income and profits. This provision, from the time of its enactment, fastened itself upon estates of married women held under the act of 1848.—Weems v. Bryan, 21 Ala. 302; Durden and Wife v. McWilliams & Smith, 31 Ala. 438; Pickens v. Oliver, 29 Ala. 528; Daniels, Elgin & Co. v. Sprague and Wife, 31 Ala. 444.

In Durden and Wife v. McWilliams & Smith, *supra*, we considered the question of the liability of the separate estates of married women for family supplies, under section 1987 of the Code.—See that case, and Ravesies and Wife v. Stoddart & Co., 32 Ala. The liability there declared, is not one created for the benefit of the husband, but for the benefit of the creditor, and possibly for her own support and protection.

With these explanatory remarks, we cordially adopt the arguments and conclusions of the chancellor.

Decree affirmed.

GRAYSON *vs.* GLOVER.

[ACTION ON PROMISSORY NOTE BY ASSIGNEE AGAINST MAKER.]

1. *Competency of assignor as witness for assignee.*—When the assignee of a promissory note is the defendant in an action, and seeks to establish it as a set-off, he may render his assignor a competent witness for him, to prove the time when the assignment was made, by releasing him from all liability on account of the note : section 2290 of the Code does not apply to such a case.
2. *Admissibility of transferor's declarations as evidence against transferee.*—In an action brought by the assignee against the maker of a promissory note, the defendant seeking to establish as a set-off a note executed by the assignor to a third person, and transferred by the latter to the defendant, a memorandum, written on the latter note by the plaintiff's assignor, stating that said note, if "taken up" by the defendant, should be credited on the note of the latter to him, is competent evidence for the defendant, if shown to have been made before the transfer of the note sued on.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Edwin A. Glover, against H. C. Grayson and Mrs. Emeline Grayson, and was founded on the defendants' promissory note for \$500, dated January 29, 1853, payable on or before the 1st January, 1855, with interest from the 1st January preceding, to William Glover or bearer, by whom it was endorsed to the plaintiff. On the trial, as appears from the bill of exceptions, after the plaintiff had read in evidence the note sued on, the defendants offered in evidence, under the plea of set-off, a promissory note for \$131 18, executed by said William Glover, dated January 1, 1853, and payable one day after date to R. Tuller or order; together with an endorsement thereon, signed by said Tuller, in these words: "Pay Mrs. Emeline and H. C. Grayson." The defendants then proposed to introduce said Tuller as a witness for them, "for the purpose of showing the time when said note claimed as a set-off was transferred to them." The plaintiff objected to the competency of said witness, "on the ground that he was

the transferror of the note claimed as a set-off, and therefore was incompetent as a witness for the defendants." To show the competency of said Tuller as a witness for them, the defendants then proved to the court, that they had given the plaintiff five days notice of their intention to introduce him as a witness on the trial, and had released him from all liability on account of his transfer of said note to them; and produced the notice and release. The court ruled that the witness was incompetent, and the defendants excepted.

"The defendants then offered to prove a memorandum, or note in pencil, made by said William Glover on the note claimed by them as a set-off, in these words: 'If Mrs E. and H. C. Grayson can take up this note with R. Tuller, the same shall be credited on your note due me.' This was offered as tending to show a declaration of said Glover, made before he had transferred to plaintiff the note sued on, and while it was in his possession, inducing defendants to purchase said note; and also to show that defendants held said set-off before the transfer by William Glover to plaintiff of the note sued on. The plaintiff objected to the introduction of this evidence, as incompetent, and the court sustained the objection; ruling, that the declarations of William Glover, either before or after he had transferred to plaintiffs the note sued on, were incompetent evidence for the defendants in this suit, though they would be good in a suit between the defendants and said William Glover; to which ruling of the court the defendants excepted."

These two rulings of the court are now assigned as error.

JOHN F. VARY, for the appellants.

GEO. G. LYON, *contra*.

RICE, C. J.—Under section 1530 of the Code, a promissory note is "assignable by endorsement, so as to authorize an action thereon by each successive endorsee." When not payable at a bank or private banking-house, it is, under section 1531 of the Code, "subject to all payments, sets-off, and discounts, had or possessed against

the same previous to notice of the assignment or transfer." It may, under section 2240 of the Code, be pleaded and relied on as a set-off by the assignee, in a suit brought after it became due, and after the assignment, where, as here, the suit against him is founded upon a note made by him and another. And when it is so pleaded and relied on *in defense*, the assignor or endorser, if released from all liability on account of the promissory note or the transfer thereof, is, under the Code, a competent witness for *the defendant*—the *endorsee*—to prove the time when the endorsement was made.—Code, §§ 2290, 2302; Todd v. Hardy, 9 Porter's Rep. 346; Tipton's Adm'r v. Robinson's Adm'r, 31 Ala. R. 595; Commonwealth v. Cooley, 10 Pick. R. 37.

Although a plea of set-off is in the nature of a cross action, it certainly is not a suit within the meaning of section 2290 of the Code; nor does *the defendant* become "the plaintiff" in the suit, by merely pleading thereto as a set-off a promissory note made by the plaintiff to a third person, and endorsed by that third person to the defendant. Section 2290 makes "the transferrer, or party with whom the contract was originally made," an incompetent witness "*for the plaintiff*, to prove *the cause of action*;" and that, only "*when suit is brought by the transferee*." It does not exclude the endorser of a promissory note, when he is fully released by the *defendant* endorsee, and offered as a witness for that *defendant*.

These views bring us to the conclusion, that the court below erred in ruling that Tuller was not a competent witness for the defendants. And that conclusion makes it probable, that it is unimportant to the parties that we should decide expressly whether "the memorandum, or note in pencil made by William Glover, (*the payee* of the note sued on,) on the note claimed by defendants as a set-off in this case," was admissible. It is deemed sufficient to say, that if it was made *before he transferred the note sued on*, it was clearly admissible, as it was the first step towards proving a partial payment of the note sued on; and was relevant to an issue in the case.—Cuthbert v. Newell, 7 Ala. R. 457; Laroque v. Russell, 7 Ala. R. 798.

Such declarations of *the payee* of a note, when made before he has transferred it, are, beyond all question, evidence against the transferee, in favor of the makers of the note. Whether the declarations of *the payee* are not admissible against the transferee in favor of the makers, *in the absence of all proof as to the time when they were made*, we deem it unnecessary to decide, and therefore decline to decide.—See *Sally, use &c. v. Gooden*, 5 Ala. 78.

For the error above pointed out; the judgment is reversed, and the cause remanded.

CHILDRESS AND WIFE vs. TAYLOR.

[ACTION AGAINST HUSBAND AND WIFE FOR ARTICLES OF FAMILY SUPPLY.]

1. *Sufficiency of appeal bond*.—Where a married woman takes an appeal, from a judgment in an action at law against her and her husband, she may execute an appeal bond in her own name, without joining her husband.
2. *Service of summons*.—In an action against husband and wife, if the sheriff's return shows that the summons was not executed on the wife, and there was no appearance by her, the judgment against both will be reversed on error.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

The complaint in this case was in these words :

<p>“James H. Taylor <i>vs.</i> James L. Childress, and Susannah L. Childress, his wife.</p>	}	<p>The plaintiff claims of the defendants a balance of 93 10-100 dollars, due for goods, wares and merchandise, sold and delivered by plaintiff to defendants in the months of April and May, 1857, together with interest on the amount from the time of the sale. The plaintiff avers, that Mrs. Susannah L. Childress has, and had at the time, a separate estate from her husband; and that the articles of merchandise so furnished were of</p>
--	---	---

comfort and support to the household, and suitable to the degree and condition of the family of the defendants, and for which the husband would be responsible at common law."

The sheriff's return on the summons was as follows: "Received 24th September, 1857, and on the 28th September, 1857, I served a copy of the within summons and complaint on James L. Childress."

The judgment of the court is in these words:

<p>"James H. Taylor <i>vs.</i> James L. Childress, and Susannah L. Childress, his wife.</p>	}	<p>This day came the plaintiff, by his attorney; and thereupon came a jury," &c., "who were empaneled and sworn to assess the plaintiff's damages, and on their oaths do say, 'We assess the damages at one hundred and fifty-six 42-100 dollars.' It is therefore considered by the court, that the plaintiff have and recover of the defendants the said sum of one hundred and fifty-six 42-100 dollars, the damages so assessed by the jury, together with the costs in this behalf expended. And the plaintiff, in open court, remits sixty-three 32-100 dollars of the judgment."</p>
--	---	---

From this judgment Mrs. Childress sued out an appeal, and executed a *supersedeas* bond, in which her husband did not join. Errors were here assigned, in the names of both the defendants below separately, in these words: "1. The female appellant says, there was no service of process upon her, and judgment was rendered by default. 2. Both the appellants say, that there was no judgment by default, and the jury was empaneled to assess the damages; which was error. 3. That neither the summons nor the complaint was served on the female appellant, nor did she appear or have notice of the suit; therefore no judgment ought to have been rendered against her." The appellee submitted a motion to dismiss the appeal.

E. S. DARGAN, for the appellants.

CHAMBERLAIN & HALL, *contra*.

WALKER, J.—A motion is made to dismiss the appeal in this case, upon the ground that the appellant, who is the principal in the appeal bond, is a *feme covert*. The Code, in sections 1987, 1998, and 2131, authorizes proceedings at law for and against a *feme covert* in her own name; and section 3019 requires the appellant to give the appeal bond. To deny to her the power to give an appeal bond in such cases, where her appearance is neither by next friend nor guardian, would involve a denial of the right of appeal accompanied by a *supersedeas*. The Code must, therefore, be understood to clothe a married woman with the power of giving an appeal bond.

The sheriff's return shows that there was no service upon the *feme covert* defendant. It negatives the fact of the leaving of a copy of the summons and complaint with her, as required by section 2165 of the Code. There was no appearance by the *feme covert* defendant. The judgment, being rendered against her without a service by her or an appearance, is erroneous.—*Smith & Howell v. Winthrop*, Minor, 425; *Lucy v. Beck*, 5 Porter, 166; *Griffin v. Rayfield*, 19 Ala. 27; *Faver v. Briggs*, 18 Ala. 478; *Kennedy v. Millsap*, 25 Ala. 570; *Dew v. Cunningham*, 28 Ala. 466.

Judgment reversed, and cause remanded.

WRAY vs. WRAY.

[BILL IN EQUITY BY WIFE FOR PERMANENT ALIMONY.]

1. *Presumed continuance of insanity once established*.—Insanity being once established, its continuance is presumed until the contrary is proved.
2. *Insanity excuses adultery*.—Adultery, committed by the wife while insane, is no bar to her claim for alimony.
3. *When wife is entitled to decree for alimony*.—The failure of the husband to provide for his wife, while separated from him without fault on her part, and confined in a lunatic asylum, a sufficient maintenance and support, suitable to her condition and circumstances, entitles her to a decree for alimony.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Mrs. Susan M. Wray, suing by her next friend, against her husband, Albert G. Wray, and sought a decree for alimony. The parties to the suit are the same as to the case reported in 19 Ala. 522, which was an application by Mr. Wray for a divorce, on the ground of adultery committed by his wife. That application was refused, although the fact of adultery was proved, because it appeared that the wife was insane at the time of its commission; the court holding, that adultery on the part of the wife, committed while insane, was no ground of divorce. This bill was filed after the final disposition of the former case. It alleged, that the parties were married in 1835, and lived together as husband and wife until some time in 1848, when a separation took place between them, and complainant was sent by her husband back to her mother's house in Georgia; that the defendant was possessed of a large estate, and received several slaves by his said marriage with complainant; that the complainant, in October, 1850, offered to return to her husband's house, and to resume her conjugal duties, but he refused to receive her; and that he also refused to make any provision for her maintenance and support.

The defendant answered the bill; alleging, that his separation from his wife was caused by his discovery that she had been faithless to him; that he gave her, at the time of the separation, two negroes, and about three hundred dollars in money; that he had since paid out over one thousand dollars for her support and maintenance; that the complainant, after the filing of the bill, had given birth to an illegitimate child; and that the defendant, since that time, had made arrangements for her board and other expenses, as a first-class patient, at a lunatic asylum in South Carolina, where she was confined.

The material facts established by the evidence are these: Mrs. Wray was carried to the lunatic asylum, by her friends, in April, 1849, and remained there until some

time in December, 1850, when she was discharged. For several years prior to 1849, she had been insane; and evidence was adduced, which the chancellor deemed sufficient, to show that her insanity still continued. In October, 1851, accompanied by a physician, she returned to the neighborhood where her husband was, and offered to resume conjugal relations with him; but he rejected her overtures. In April, 1852, she was carried back to the asylum, where she was delivered of a child in the month of July following; and she was still an inmate of the asylum when the several witnesses in the cause were examined. The slaves received by the defendant, by virtue of his marriage, were shown to have increased to about twenty-five in number; and his other property was variously estimated by the several witnesses at from \$70,000 to \$100,000. The master reported, on a reference, that the provision made by the defendant for the complainant's expenses at the asylum was about \$450 per annum, and that it was insufficient; that about \$1100 was a suitable provision for her comfortable support and enjoyment, as a first-class patient at the asylum, to which position she was entitled; and this report was confirmed by the chancellor, without exception by either party.

On final hearing, the chancellor rendered a decree for the complainant; directing the defendant to pay over, at the times and in the manner specified, the amount reported by the master as a proper allowance for the complainant's support, to be expended under the directions of the principal of the lunatic asylum; and ordering the cause to be retained on the docket, for future orders and decrees, as circumstances might require.

The chancellor's decree is now assigned as error.

ELMORE & YANCEY, for the appellant.

CLOPTON & LIGON, *contra*.

STONE, J.—In a contest between these parties, determined in this court at the June term, 1851, on an application by Mr. Wray for divorce, this court decided that Mrs. Susan M. Wray was insane at the time the acts were

committed, for which the divorce was sought.—See Wray v. Wray, 19 Ala. 522. The report of that case was in evidence in this case, as shown by the record.

The proof of her mental condition since that time is probably sufficient to show that, at no time since her deflection from the path of propriety, has she been either legally or morally accountable. We need not, however, decide this question. Insanity being once established, its continuance is presumed until the contrary is proved. Rawdon v. Rawdon, 28 Ala. 565. The contrary is not proved in this case.

- It is claimed for appellant, that as he has proposed to provide for Mrs. Wray a support, and has actually made some provision for her, he should not be decreed to do what he has already done. If he had, up to the time of the trial, made for his insane wife sufficient provision, and this, independent of any coercive measures through the courts of the country, we would consider the legal question presented. The report of the register, however, which was confirmed by the chancellor—confirmed, too, without any exceptions to the register's report—proves conclusively that the support offered and supplied by Mr. Wray is greatly inadequate. This renders a decision of the above question unnecessary.

The principles settled in the case of Mims v. Mims, at the present term, are decisive of this, and prove that the chancellor committed no error.

The decree of the chancellor is affirmed.

RICE, C. J., not sitting.

MALONE vs. CARROLL.

[BILL IN EQUITY TO ESTABLISH EQUITABLE SET-OFF AGAINST ASSIGNED NOTE.]

1. *Further examination of witnesses, and cross bill for discovery, not allowable after final hearing, and reversal of decree on error.*—When a bill has been dismissed by the chancellor, on final hearing on pleadings and proof; and the supreme court has reversed his decree, on error, declaring the principles which govern the case, applying those principles to the pleadings and proof, determining all the material points in favor of the complainant, and remanding the cause for further proceedings not inconsistent with the opinion,—neither party can claim, as matter of right, to enter into a fresh examination of the questions in issue, either by a further examination of witnesses, or by a discovery from his adversary.
2. *Conclusiveness of judicial decisions.*—On a second appeal in a cause, the appellate court must be governed by the points and principles settled and decided on the former appeal, unless the record shows so material a change of the case as renders them inapplicable; nor can error be imputed to the inferior court, so far as its subsequent proceedings conform to those points and principles.
3. *Same, and application of maxim, that he who seeks equity must do equity.*—On bill filed by the maker against the assignee of a note, for the purpose of establishing an equitable set-off against the payee, if the complainant shows a case which, in the absence of all indemnity, would be sufficient to entitle him to relief, his mere failure to disclose in his bill that he had received partial indemnity cannot deprive him of all claim to relief; especially where it appears that the appellate court, on a former appeal from the decree of the chancellor, who dismissed the bill on final hearing on pleadings and proof, decided that the complainant was entitled to relief; and this, notwithstanding the point was not then noticed by either the court or the counsel.

APPEAL from the Chancery Court of Franklin.

Heard before the Hon. JOHN FOSTER.

THE facts of this case will be readily understood from the briefs of counsel, and the opinion of the court, in connection with the former report in 28th Ala. 521–29. The counsel of both parties submitted very elaborate arguments, the great length of which prevents their insertion in the report. The annexed abstracts show only the points made and the authorities cited.

JOHN A. NOOE, and L. P. WALKER, for the appellants, made these points :

1. The chancellor erred in overruling the application of the defendants below for leave to take additional testimony, and also for leave to file a cross bill for discovery. *Keenan v. Strange*, 12 Ala. 292; *Lyon v. Bolling*, 24 Ala. 763; *Beach v. Fulton Bank*, 2 Wendell, 225.

2. The chancellor erred, also, in overruling the defendants' exceptions to the master's report, and in decreeing in favor of the complainant. The bill should have been dismissed, because the proof showed that the plaintiff had forfeited all claim to relief, if he ever had any, by his failure to disclose that he had received partial indemnity from Barton. So far from disclosing this important fact, the bill alleges, "that Barton died insolvent, without making provision for the payment of *any part of said debts*;" and that, unless the complainant "got the benefit of the set-off claimed by him, it would be a *total loss* to him." It is a fundamental maxim of the chancery court, that a party asking relief must come before it "with clean hands and a clear conscience;" and again, that "he who is guilty of iniquity shall not have equity;" and again, that nothing can call the powers of the court into active exercise, "but conscience, good faith, and reasonable diligence." For analogous cases, in which the court refused relief, because the party complaining was guilty of fraud or want of good faith, see *Overton v. Perkins*, *Martin & Yerger*, 371; *Kennedy v. Kennedy*, 2 Ala. Rep. 572; *Dabney v. Green*, 4 Hen. & Mun. 109; *Brantley v. West*, 27 Ala. Rep. 552; *Pierce v. Partridge*, 3 Metc. 44; *Fairfield v. Baldwin*, 12 Pick. 388; *M. E. Church v. Jacques*, 3 John. Ch. 117; *Taylor v. Harwell*, 5 Humph. 331; 2 Vesey, 289; 1 Vernon, 452; 1 P. Wms. 731; 2 P. Wms. 748; *Wells' Ex'r v. Bransford*, 28 Ala. 200; 7 Mon. 465; 4 Peters, 184; 1 Fonb. Eq. 25, 139-40, 327, note; *Adams' Eq.* 175; 2 Story's Eq. § 61; *Askew v. Hooper*, 28 Ala. 635.

3. The former opinion pronounced by the court in this case is not conclusive on the points now presented. The former appeal was taken from a decree of the chancellor

dismissing the bill for want of equity. The jurisdiction of the supreme court, as conferred and limited by the constitution, is appellate only. It has no power, on appeal from a decree dismissing the bill for want of equity, to decide the cause upon its merits, for this would be the exercise of original jurisdiction. The effect of the former decision was simply to reverse the chancellor's decree, and to reinstate the cause in the court below for further proceedings not inconsistent with the principles there settled. That decree was interlocutory merely, and does not conclude the court on the present appeal, which brings up the whole case for revision, from examining any error or mistake of law or fact.—Keenan v. Strange, 12 Ala. 292; Brown v. Lang, 14 Ala. 722; Price v. Nesbitt, 1 Hill's (S. C.) Ch. 452-65; Pearson v. Darrington, 18 Ala. 352; Moore v. Barclay, 23 Ala. 750; 1 Bailey's Ch. 98; Harwood v. Oglander, 6 Vesey, 225; Curtis v. Curtis, 2 Bro. C. C. 629; Roberts v. Salisbury, 3 Gill & J. 425; Hagthorpe v. Hook, 1 Gill & J. 270; Daniels v. Taggart, 1 Gill & J. 311; Claggett v. Crawford, 12 Gill & J. 275; Snowden v. Dorsey, 6 Har. & J. 114; Walker v. Forbes, 31 Ala. Rep. 9; 10 Vesey, 34; 17 Johns. 548; 16 Johns. 415; 2 Cranch, 33; 2 Atk. 438; 1 Johns. Ch. 88; 1 Sneed, 101; 12 Ves. 458; 2 Madd. Ch. 351; 3 Hen. & Munf. 243; 3 Call, 243.

R. W. WALKER, and WM. COOPER, *contra*, contended,—

1. That the application for leave to take new testimony came too late.—2 Dan. Ch. Pr. 1134, note; *ib.* 1136, note; Hamersly v. Lambert, 2 Johns. Ch. 428; Wood v. Mann, 2 Sumner, 316; Moody v. Payne, 3 Johns. Ch. 294; Johnston v. Glasscock, 2 Ala. 249; Grier v. Campbell, 21 Ala. 328; Gray v. Murray, 4 Johns. Ch. 412; Baker v. Whiting, 1 Story, 233; McCall v. Sinclair, 14 Ala. R. 764; Hunt v. Smith, 3 Rich. Eq. 466; Young v. Keightley, 16 Vesey, 359; Greenlee v. McDowell, 4 Ired. Eq. 481; Franklin v. Wilkinson, 3 Munf. 112; Dunham v. Winans, 2 Paige, 24; Moody v. Farr, 27 Miss. 788; 19 Penn. 431; Caller v. Shields, 2 Stew. & P. 417; Bradshaw v. Garrett, 1 Porter, 47; Randolph v. Randolph,

1 Hen. & Munf. 180; Pfeltz v. Pfeltz, 1 Maryland Ch. Dec. 456.

2. That the petition for leave to file cross bill for discovery also came too late.—Serry v. Arden, 1 Johns. Ch. 62; Fielder v. Schœflin, 7 Johns. Ch. 250; Gouverneur v. Elmendorf, 4 John. Ch. 357; White v. Buloid, 2 Paige, 164; Cartwright v. Clark, 4 Metc. 104; Irving v. DeKay, 10 Paige, 319; Roberts v. Peavy, 9 Foster, 392; Cocke v. Evans, 9 Yerger, 294; Moore v. Dial, 3 Stewart, 155; Mallory v. Matlock, 10 Ala. 596; Price v. Cannon, 3 Mis. 453; 15 Ark. 29.

3. That the former decision is conclusive of all the other points made for the appellants.—Carroll v. Malone, 28 Ala. R. 522; Miller v. Jones, 29 Ala. R. 174; Bryan v. Weems, 25 Ala. 195; Johnston v. Glasscock, 2 Ala. 519; McClellan v. Crook, 7 Gill, 333; Gelston v. Codwise, 1 Johns. Ch. 189, 194; Young v. Frost, 1 Md. 377, 396; Biscoe v. Tucker, 14 Ark. 515; Gilmore v. Patterson, 36 Maine, 544; Calkins v. Evans, 5 Ind. 441; 10 Wheat. 431, 441; 5 Cranch, 316; 1 Wheaton, 364; 7 Wheaton, 58; 3 Md. Ch. Dec. 418; 1 Ohio St. R. 511; Haskell v. Roane, 1 McCord's Ch. 29; Grier v. Campbell, 21 Ala. 333; Hanberry v. Hanberry, 29 Ala. 719; 3 Dana, 427; 4 Florida, 359; 9 Leigh, 262.

RICE, C. J.—The bill in this case was filed to obtain the benefit of an equitable set-off. In 1854, upon a hearing of the cause “on bill, answers, demurrers and proof,” the chancellor pronounced his decree dismissing the bill. On appeal by the complainant from that decree, this court, at its January term, 1856, pronounced and filed its opinion, which not only declared the principles that should govern the case, but applied them to the pleadings and proof, and decided all the material points in favor of the complainant, and reversed the decree of the chancellor, and remanded the cause “for further proceedings, not inconsistent with the principles” declared in the opinion.—See Carroll v. Malone, 28 Ala. Rep. 521.

After the cause was thus remanded, the respondents

applied to the chancellor for leave to take further testimony, and also for leave to file a cross bill for discovery from the complainant. The chancellor overruled each application. The pleadings and proof being substantially the same as they were when the case was formerly here, the cause was finally disposed of by the chancellor, and a decree was pronounced in conformity to the points decided and principles settled by our opinion on the former appeal. From that decree the respondents took the present appeal.

The points now relied on for a reversal are disposed of by the following incontrovertible positions:

1. After the chancellor, upon a hearing of a cause on bill, answers, demurrers, and proofs, has filed his decree dismissing the bill; and the supreme court, on an appeal by the complainant from that decree, has filed its opinion, declaring the principles which govern the case, and applying them to the pleadings and proofs, and determining all the material points in favor of the complainant; and has, in connection with that opinion, reversed the decree of the chancellor, and remanded the cause for further proceedings, not inconsistent with the principles settled by the opinion,—neither party is allowed, *as matter of right*, to enter into a fresh examination in that cause of the questions in issue, either by a further examination of witnesses, or by discovery from his adversary. *Hamersly v. Lambert*, 2 Johns. Chancery Reports, 432; *Southard v. Russell*, 16 How. Rep. 547; *McClellan v. Crook*, 7 Gill, 333; *Young v. Frost*, 1 Md. R. 377.

2. On the *second* appeal in a case, the points decided and principles settled on the *first* appeal must govern the appellate court, unless the record shows so material a change of the case as to render them inapplicable. *Brown v. Somerville*, 8 Md. R. 444. And no error can be imputed to the inferior court, if in its subsequent proceedings it conformed to the points so decided, and to the principles so settled.—*Young v. Frost*, *supra*; *Thomas v. Doub*, 1 Md. R. 324; *Matheson v. Hearin*, 29 Ala. R. 210; *Matthews v. Sands*, 29 Ala. R. 136.

3. When, in the absence of all indemnity, a complain-

ant would be entitled to the benefit of an equitable set-off set forth in his bill, his mere failure to disclose in his bill that he had received *partial* indemnity thereon cannot operate to deprive him of all claim to relief. If it could so operate in any case, it could not in one like this, where, upon the very same evidence in relation to the partial indemnity, and in the very same cause, the appellate court had previously reversed the decree of the chancellor dismissing the bill, and had, in effect, decided that the complainant was entitled to relief, notwithstanding his failure to disclose that he had received partial indemnity.—See brief of the counsel for appellee, and the authorities there cited.

If there be any error, it is not to the prejudice of the appellants; and the decree of the chancellor must be affirmed, at their cost.

HIGH vs. WORLEY.

[BILL IN EQUITY FOR DISCOVERY IN AID OF ACTION AT LAW.]

1. *Equitable conversion*.—It is a settled principle of equity jurisprudence, that land, directed by will to be sold and converted into money, is to be considered and treated as money; and a direction for the postponement of the sale, until the happening of a future event, does not prevent the operation of the principle.
2. *Re-conversion*.—In such case, however, the parties interested may, at their election, re-convert the property into land; but such re-conversion can only be made by all the parties interested, and not by each one separately for himself.
3. *Election*.—The distributees of a deceased legatee cannot make such election, without showing that the absence of debts renders administration on the estate of the legatee unnecessary; nor can a married woman, not owning a separate estate by statute, make such election for herself, although she is living separate and apart from her husband.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE facts of this case, as presented by the bill, are these:

Adonijah Worley died, in said county of Dallas, in the year 1830, after having executed his last will and testament, which was duly admitted to probate after his death, and which contained the following clause: "It is my wish and desire, that all the lands which I own, adjoining the town of Selma, may be held and retained by my executor, for the use and support of my wife and children, together with two female slaves, all the household and kitchen furniture, and the stock of every description whatsoever, until my daughter Fanny Ann shall arrive at the age of sixteen years; then to be sold, and the proceeds equally divided between my wife and children, share and share alike." The testator's widow, Mrs. Fanny Worley, and his three children, Williamson W., Fanny A., and Nancey E. Worley, survived him, and were his sole distributees and heirs-at-law. After the testator's death, Williamson W. Worley also died, intestate, and without having ever married. Nancy E. Worley married Edward W. High, (at what time does not appear,) and died on the 25th December, 1844, intestate, and leaving an only child, who survived her but a few weeks, and whose sole heir and distributee was its father, said Edw'd W. High. Fanny A. Worley, the testator's other daughter, married one Thomas Todd, but was living separate and apart from him when the bill was filed.

The testator, at the time of his death, did not have the legal title to the tract of land mentioned in his will, but held the title-bond of William R. King and George Phillips, who were the patentees of the United States, and also commissioners of the town of Selma to make titles to town lots. In 1849, after the death of his wife and child, High went to California, leaving Mrs. Worley in the possession of the land, and supposing that she would hold and cultivate it for the benefit of all the parties interested. On his return, he found that she had obtained a deed for the land from said King and Phillips, conveying it to her, or to her and Mrs. Todd. He then filed his bill against Mrs. Worley, Mrs. Todd and her husband; alleging, in addition to the facts above stated, that this

deed was intended to deprive him of his interest in the land, and to prevent him from maintaining any action at law on account of it; that it was never recorded, and that the parties refused to let him inspect it. The prayer of the bill was for a discovery in relation to the deed; that the same might be set aside and annulled, if found to be inconsistent with his rights, and for general relief.

The defendants demurred to the bill, for want of equity, and the chancellor sustained their demurrer; and the decree of the chancellor, dismissing the bill, is now assigned as error.

JNO. T. MORGAN, and GEO. W. GAYLE, for the appellant.

JONA. HARALSON, and WM. M. BYRD, *contra*.

WALKER, J.—It is a well recognized principle of equity jurisprudence, that the court of chancery will consider land, directed to be sold and converted into money, as money.—Adams' Equity, 136; 2 Story's Equity, 115, § 790; *ib.* 627, § 1212; Willard's Equity, 47, 298, 299. The testator, Adonijah Worley, directed that the land should be retained by the executor, for the use and support of his wife and children, until his daughter Fanny Ann attained the age of sixteen years; that it should then be sold, and that the proceeds of the sale should be equally divided between his wife and children, share and share alike. The postponement of the sale, to the time of the daughter's becoming sixteen years of age, does not prevent the operation of the principle, and the equitable conversion of the land into personalty.—Reading v. Blackwell, 1 Baldwin, 166; Rinehart v. Harrison, *ib.* 177.

[2.] The land being by the will transmuted into personalty, it so remains, unless it has been re-converted into realty. Such a re-conversion is susceptible of production by the election of the beneficiaries. The rule, which permits the re-conversion by the election of the parties interested, is founded in the fitness and equity of permitting them to consult their own interests, according to the dictates of their own judgments, and in the utter folly of compelling them accomplish the same object by purchas-

ing in at the sale.—Commonwealth v. Martin, 5 Munf. 117–127. But the election cannot be made by a part of the several persons interested. It must be made by all. The direction to sell the land gives to each a right to have it sold, and takes away from each one the separate right to re-convert his single share, and thus have the sale of a fraction.—Fletcher v. Ashburner, 1 Brown's C. C. 497–500; Allison v. Wilson, 13 Serg. & R. 330; Willing v. Peters, 7 Barr, 287; Pratt v. Taliafero, 3 Leigh, 419.

[3.] If, then, all the persons interested in the proceeds of the sale directed by the will have not elected to make the change back from the money, into which there is an equitable conversion, to its original condition of land, it is money still, and not land. The persons interested in the distribution were the widow and the three children, Williamson W., Fanny A., and Nancy E. Worley. Williamson W. Worley, after the testator's death, died intestate and without children, having never married; but whether he left any debts, does not appear from the allegations of the bill. His interest would regularly pass to an administrator; and the state of facts does not exist, under which an equitable title in the entire interest would pass to the next of kin as the distributees.—Vanderveer v. Alston, 16 Ala. 494. If, then, it were conceded, that the distributees of Williamson W. Worley had made an election to take the land without a sale, the bill would be defective, in the omission to show that they had succeeded to the interest, and had the right to make the election. Fanny A. Worley, another one of the persons among whom distribution of the proceeds of the sale is directed to be made, is alleged to be a *feme covert*, living apart from her husband. The fact that she is living apart from her husband, does not, of itself, invest her with the power to act as a *feme sole*; and she must, therefore, be regarded as under all the disabilities of coverture. A married woman, of herself, is incapable of making an election, unless under some judicial authority, to re-convert her interest in the legacy into the original condition of land. Pratt v. Taliafero, 3 Leigh, 419; Siter, Price & Co. v. McClanahan, 2 Grat. 280; Hannah v. Swarner, 3 W. & S.

223; *Oldham v. Hughes*, 2 Atk. 452. The bill does not aver the time of the marriage, or any fact showing that the *feme covert* would have a separate estate under any of our statutes in her share of the proceeds of the sale of the land; and our denial of her power of election must be understood in reference to the case as made by the bill.

The wife of complainant appears to have made no election to take the land before the marriage with him. If it be conceded, that the child which she left was her sole distributee, and that the complainant was the sole distributee of the child, the right of election could not pass to the complainant, unless that state of facts had been shown, which would justify a court of equity in regarding the right of the distributee as vesting, without the interposition of an administration.

From what we have said, it is clear, that the bill does not make out a case, in which the re-conversion into land can be regarded as made, even though it be conceded that the widow has elected to take land.

The right, therefore, of the wife of the complainant passed upon her death to the administrator of her estate. We cannot assume, that there were no creditors of the deceased wife, and that therefore, under the principle settled in *Vanderveer v. Alston*, 16 Ala. 494, the complete equitable title vested in her child, who was her sole distributee, and, upon the death of the child, who lived only twenty-seven days, in the complainant, who was its father and sole distributee.

The complainant has not, upon the allegations of the bill, shown any title, and is, therefore, entitled neither to a discovery nor relief.—*Story's Eq. Pl.* §§ 317, 257.

The decree of the court below is affirmed.

GUNN vs. SAMUEL'S ADM'R.

[BILL IN EQUITY BY CREDITOR AGAINST ADMINISTRATOR OF DECEASED WIFE.]

1. *Liability of wife's separate estate for necessities furnished to herself and family.*—A married woman, owning a separate estate created by deed, may charge it, by contract express or implied, with the payment of necessary medical services rendered to her and the family ; but, where it appears that the physician was called in by the husband, and it is not shown that the wife authorized or assented to his employment on the credit of her separate estate, the debt imposes a legal liability on the husband alone, although he was insolvent at the time ; and the fact that the wife, during her last illness, requested her husband and children to pay the debt, is not sufficient to charge her separate estate with its payment.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by James M. Gunn, the appellant, against the administrator of Mrs. Sarah A. Samuel, deceased, her husband, and their children ; and sought to subject Mrs. Samuel's separate estate to the payment of an account for medical services rendered by the complainant to her and her family during her life-time. The account embraced a period of six years, commencing in 1846, and ending in January, 1852, when Mrs. Samuel died ; and contained items for medicines and services furnished and rendered to Mrs. Samuel, her children, and her slaves. Mrs. Samuel's separate estate, consisting entirely of slaves, was held under a deed of gift from her father, executed in April, 1838, which conveyed the slaves to trustees for the sole use and benefit of her and her children. The trustees appointed by the deed did not act in the matter, but Mr. Samuel controlled and managed the slaves as the acting trustee. The bill alleged, that Mr. Samuel was insolvent during the time the account was being contracted ; that the plaintiff was called in at the instance of Mrs. Samuel, and that the services were rendered on the faith and credit of her separate estate. Decrees *pro confesso* were entered against Mr. Samuel and the adminis-

trator of Mrs. Samuel; but answers were filed on behalf of the children, denying the liability of the separate estate to the complainant's demand, and requiring proof of the allegations of the bill. The testimony showed that the plaintiff was called in to attend Mrs. Samuel, her children and slaves, while sick, by Mr. Samuel, who was then and continued to be insolvent; and that Mrs. Samuel, during her last illness, requested her husband and children to sell one of the slaves, for the purpose of paying the plaintiff's account. On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

GEO. W. GUNN, and J. FALKNER, for the appellant.

BROCK & PRESLEY, *contra*.

STONE, J.—If this record presented the case of a contract by Mrs. Samuel, either express or implied, to pay Dr. Gunn for his services, he would be entitled to recover in this proceeding what seems to be a just demand in favor of Dr. Gunn.—Walker and Wife v. Smith, 28 Ala. R. 569; Collins v. Rudolph, 19 Ala. R. 616; Colvin v. Currier, 22 Barbour, 371.

The proof, however, clearly shows, that Mr. Samuel, the husband, employed and called in Dr. Gunn; and there is no evidence that Mrs. Samuel was at all consulted, or gave any authority or assent that he should be employed on the faith or credit of her separate estate. It being the legal, as well as moral duty of the husband, to supply proper medical assistance to his sick wife, it is manifest that a legal liability rests on Mr. Samuel to pay the medical bill of Dr. Gunn.—See Cothran v. Lee, 24 Ala. 380; Zeigler v. David, 23 Ala. 127; 2 Bright on H. & W. 5, 6, 7, 8, 10; 1 Parsons on Con. 253, *et seq.*; *ib.* 286, *et seq.* The declaration of Mrs. Samuel, made to her father during her last illness, did not impose on her an original liability, or render her separate estate responsible for the debt of another. We have found no case which would authorize the relief sought by this bill.

The decree of the chancellor is affirmed.

MAY vs. MAY'S ADM'R.

[BILL IN EQUITY TO HAVE ABSOLUTE DEED DECLARED MORTGAGE.]

1. *Fraudulent deed not reformed.*—A court of equity will not, at the instance of the grantor, declare a deed, absolute on its face, to be a mortgage or trust, when the evidence shows that the transaction was intended by the parties to delay, hinder or defraud the grantor's creditors.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Alexander May, on the 24th January, 1855, against the administrator of his deceased brother, John May; and sought to have a deed, absolute on its face, declared a mortgage, and for a redemption and account. The deed sought to be reformed was executed by the complainant on the 15th March, 1843; recited a consideration of \$6,000, in hand paid; and conveyed to the grantee a tract of land, twenty-two slaves, and some other personal property, the aggregate value of which at that time was proved to be between \$15,000 and \$20,000. The administrator answered the bill; denying that the deed was intended to operate as a mortgage; and insisting that the transaction, if accompanied by any parol agreement whatever, was intended to delay, hinder and defraud the creditors of the grantor. On final hearing, on pleadings and proof, the chancellor held, that while the evidence showed that the deed was accompanied by a parol agreement, which might be sufficient to convert it into a mortgage, it also established the further fact, that the transaction was intended by the parties to defraud the creditors of the grantor. He therefore dismissed the bill, and his decree is now assigned as error.

E. W. PECK, with whom was S. F. HALE, for the appellant, contended,—

1. That the evidence, consisting principally of the parties' admissions and declarations, made twelve years ago,

and repeated by witnesses who could not recollect the language used, and who only professed to give the impressions remaining on their minds, was susceptible of an interpretation consistent with honest intentions, and was, therefore, insufficient to establish the alleged fraud.

2. That if there was any fraud in the transaction, the grantee was the active perpetrator of it, and could not be heard to set it up in avoidance of the trust which he had taken upon himself; that the evidence showed that, at the time the application for a loan of money was made, the grantor desired to borrow enough to pay all his outstanding debts, and proposed to secure its repayment by a mortgage or deed of trust; and that the conveyance was made absolute in form at the suggestion of the grantee, who had the power to make his own terms, and who feared that there might be other outstanding debts. To this point they cited *Eddins v. Wilson*, 1 Ala. 237; *Roden v. Murphy*, 10 Ala. 804; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Henderson v. Segars*, 28 Ala. 352.

WM. G. JONES, and WM. P. WEBB, *contra*, cited the following cases: *Brantley v. West*, 27 Ala. 542; *Bryant v. Young*, 21 Ala. 264; *Parish v. Gates*, 29 Ala. 254; *Owen v. Sharp and Wife*, 12 Leigh, 427; *Thomas v. McCormick*, 9 Dana, 108; *Ford's Executors v. Lewis*, 10 B. Monroe, 127.

RICE, C. J.—On the 15th March, 1843, the complainant executed to John May a conveyance, absolute on its face, of a plantation, slaves and other property. The bill was filed on the 24th January, 1855, for the purpose of having the conveyance declared to be a mortgage, and the complainant let in to redeem.

An examination of the pleadings and proof has brought us to the conclusion, that the arrangement between these parties, by which John May got the title to the property of the complainant, was designed by them to delay, hinder, or defraud the creditors of the complainant. With that design, they made the sale an absolute one on its face, and a mortgage by private agreement. That being so, "no

obligation to reconvey, growing out of the transaction, or *forming part of it*," can be enforced in a court of equity. Whilst that court will not allow the grantee in an absolute conveyance to hold the property discharged of the conditions or trusts, which by his consent were attached to the conveyance, and which he agreed to fulfill *when the transaction is fair and lawful on the part of the grantor*, (Sewell v. Price's Adm'rs, 32 Ala. 97;) yet it cannot aid a grantor in carrying out and effectuating an illegal arrangement, by which he has parted with the title to his property by an absolute conveyance, for the purpose of delaying, hindering or defrauding his creditors, upon the private verbal agreement that the grantee would reconvey the property, or allow it to be redeemed. When parties enter into such arrangements, a court of equity does not interfere between them, but leaves them where they have thus placed themselves. These views are well sustained by authority, and are decisive of this case.—Brantley v. West, 27 Ala. 542; Ford's Ex'rs v. Lewis, 10 B. Mon. 127; Wright v. Wright, 2 Litt. 8; Grider v. Graham, 4 Bibb, 70; Thomas v. McCormick, 9 Dana; 108; Norris v. Norris, *ib.* 317; Trimble v. Ratcliff, 9 B. Monroe, 513; Owen v. Sharp, 12 Leigh, 427; Rhem v. Tull, 13 Ired. 62; Deally's Heirs v. Murphy, 3 A. K. Marsh, 475; Cornell v. Pierson, 4 Halsted's Ch. R. 478; Story's Conflict of Laws, § 247; Booth v. Hodgson, 6 Term R. 405; Fivaz v. Nicholls, 52 Eng. Com. Law R. 502; Roby v. West, 4 New Hamp. R. 285.

It will be readily perceived, that the result of this case would not be changed by the opinion we might entertain on the other questions presented by the record. We therefore decline to express our opinion on those questions; and put the affirmance of the chancellor's decree upon the views hereinabove expressed.

Decree affirmed, at the costs of appellant.

CHILDRESS AND WIFE vs. MANN & CO.

[ACTION AGAINST HUSBAND AND WIFE FOR GOODS SOLD AND DELIVERED.]

1. *Substantial defect in complaint available on error after judgment by default.*—When the complaint does not show a substantial cause of action, the judgment will be reversed on error, although it was rendered by default without objection.
2. *When action lies not against wife.*—An action at law does not lie against a married woman, jointly with her husband, on an open account contracted during coverture. *unless she have a separate estate*
3. *Sufficiency of complaint in action against husband and wife.*—In an action against husband and wife, for articles of family supply furnished during coverture, if the complaint does not aver that the wife has a separate estate by law, (Code, § 1987,) it shows no cause of action as against her.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

The complaint in this case was in these words:

<p>“John W. Mann & Co. vs. James L. Childress, and Susannah L. Childress, his wife.)</p>	}	<p>The plaintiffs, John W. Mann and W. Blake Rose, partners trading and doing bu- siness in the city of Mobile under the name and style of John W. Mann & Co., claim of the defendants the sum of two hundred and five 26-100 dollars, due by account on the 30th June, 1857.</p>
---	---	--

“The said plaintiffs claim of the defendants, also, the further sum of two hundred and five 26-100 dollars, due for goods, merchandise and chattels, sold and delivered by plaintiffs to said defendants on the 30th June, 1857; and plaintiffs allege, that the account aforesaid was for articles of comfort and support of the household, suitable to the degree and condition of the family of the defendants; which sum of money, with interest thereon, is still due and unpaid.”

The summons was regularly served on both of the defendants.

The judgment was as follows:

"John W. Mann & Co.

vs.

James L. Childress, and

Susannah L. Childress, his wife.

"who were empaneled and sworn to assess the plaintiffs' damages, and on their oaths do say, 'We assess the damages at two hundred and thirteen 41-100 dollars.' It is therefore considered by the court, that the plaintiffs have and recover of the defendants the said sum of two hundred and thirteen 41-100 dollars, the damages so assessed by the jury, together with the costs in this behalf expended."

This day came the plaintiffs, by their attorney; and thereupon came a jury," &c.,

From this judgment Mrs. Childress sued out an appeal, and assigned the same as error, both jointly with her husband, and separately by herself.

E. S. DARGAN, and JOHN T. TAYLOR, for appellants.

LEWIS S. LUDE, *contra*.

WALKER, J.—The complaint in this case does not show a substantial cause of action against the female appellant; consequently, the judgment must be reversed, notwithstanding it was rendered upon a default, and there was no objection in the court below.—Blount v. McNeill, 29 Ala. Rep. 473; Stewart v. Goode & Ulrick, 29 Ala. Rep. 476.

[2.] The marginal description of the parties states, that the female plaintiff is the wife of her co-plaintiff. The first count of the complaint is upon an account. A married woman cannot contract an account, during her coverture, for which she can be personally proceeded against. Marquis and Wife v. Gibson, 29 Ala. 668.

[3.] The second count is for goods, wares and merchandise, sold to the defendants, which were articles of comfort and support of the household, suitable to the degree and condition in life of the family of the defendants. No cause of action can exist against a married woman, for such articles as are described in the complaint, supplied during the coverture, unless she has a separate estate.—Code, § 1987; Durden and Wife v.

McWilliams & Smith, 31 Ala. R. 438. The second count does not aver, that the married woman who is a defendant had any separate estate, and, therefore, fails to show a substantial cause of action against her.

The judgment of the court below is reversed, and the cause remanded.

MCCULLOUGH AND WIFE *vs.* GLIDDON.

[BILL IN EQUITY BY CREDITOR, TO SUBJECT WIFE'S SEPARATE ESTATE, CREATED BY DEED, TO PAYMENT OF CHARGE.]

1. *Construction of deed of gift.*—A deed of gift, by which a father conveyed a slave to a trustee, in trust for the sole use and benefit of his daughter Eliza Jane, then a married woman, “for and during the time which she shall remain the wife of the said David,” her husband; “and if the said Eliza Jane shall die before her said husband, then to the sole use and benefit of the heirs of her body forever; which said hire and profit of said negro, and the use and benefit thereof, to the said Eliza Jane as aforesaid, are, from time to time, and at all times during the coverture, to be and remain to the sole and separate use and enjoyment of the said Eliza Jane during her life, and after her death to the heirs of her body,”—vests an absolute title in the daughter.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THIS bill was filed by John S. Gliddon, against David McCullough and Eliza Jane, his wife, and sought to subject Mrs. McCullough's separate estate to the payment of a note executed by her, jointly with her husband, during coverture. It alleged, in substance, that the note held by the complainant, which was dated the 6th October, 1856, was given for the rent of a house leased and occupied by the defendants during the years 1855–56; that Mrs. McCullough owned a separate estate in slaves, created long prior to the passage of the act of 1848, and intended, when she signed said note, to charge her separate estate

with its payment; and that her husband was insolvent. The prayer of the bill was for a discovery as to the separate estate—by what conveyance it was held, and of what property it consisted—a sale of such portion thereof as might be necessary for the purpose of discharging the complainant's demand, and general relief.

The defendants filed a joint answer; admitting the execution and consideration of the note, and the insolvency of the husband; admitting that Mrs. McCullough owned a separate estate in a slave named Jacob, and exhibiting the deed by which it was created; but denying that she intended to charge her estate with the payment of said note, and alleging that she had no power thus to impose a charge on the property.

The deed exhibited with the answer, which was dated the 11th September, 1840, was executed by James Scott, sen., the father of Mrs. McCullough, and conveyed the slave Jacob to a trustee, his heirs and assigns, forever, on the following trusts: "In trust, nevertheless, to and for the sole, private and independent use, benefit and advantage of the said Eliza Jane McCullough, for and during the time which she shall remain the wife of the said David McCullough; and if the said Eliza Jane shall die before her said husband, then to the sole use and benefit of the heirs of her body forever; which said hire and profit of said negro, and the use and benefit thereof, to said Eliza Jane McCullough as aforesaid, are, from time to time, and at all times during the said coverture, to be and remain to the sole and separate use and enjoyment of the said Eliza Jane during her life, and after her death to the heirs of her body, and not subject nor liable to the control, authority, power, disposal, possession or interference of her said husband."

On final hearing, on bill, answer, and exhibits, the chancellor rendered a decree for the complainant, and ordered a sale of the slave Jacob; and his decree is now assigned as error.

THOS. A. HAMILTON, for appellant, contended—

1. That, as the cause was heard on bill and answer, and

the answer expressly denied that Mrs. McCullough intended to charge her separate estate with the payment of the note, the legal presumption of such an intention must be considered as rebutted or overturned.

2. That the deed of gift created such an interest in Mrs. McCullough's children, that the slave could not be subjected to the payment of her debts.—7 Ala. Rep. 246; 9 Ala. 999; 17 Ala. 62; 21 Ala. 467.

E. S. DARGAN, *contra*.

STONE, J.—The deed of James Scott vests in the trustee an absolute title in the slave Jacob, for the separate use of Mrs. McCullough. The words “heirs of her body,” where they occur in the deed, are words of limitation, and not of purchase.—See the authorities collected in Shepherd's Digest, 535–6.

The decree of the chancellor is affirmed. •

BURNS vs. HAMILTON'S ADM'R.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT OF SALE.]

1. *Purchaser at judicial sale not entitled to rescission of contract on account of ignorance or mistake of law.*—A purchaser of land at a public sale by an administrator, under an order of the orphans' or probate court, cannot obtain relief against it in equity, on the ground that the sale was void for want of jurisdiction in the court by which the order of sale was granted, when it appears that there was no warranty, no fraud, and no mistake or ignorance as to any material fact.
2. *Ignorance of law and fact distinguished.*—An averment in a purchaser's bill, seeking relief against his purchase at an administrator's sale, “that he was ignorant that there was any defect in the title to said land, or that the title to the same did not pass by the said sale,” or “that the first certificate for the land had been improperly issued, and that a second one had issued,”—construed most strongly against the pleader, is merely an allegation that he was ignorant of the legal effect of the known facts, and not that he was ignorant of the facts which made the title defective.
3. *Jurisdiction of orphans' court to order sale of decedent's lands.*—The orphans' court has no jurisdiction to order the sale of lands, to which the decedent had a pre-emption claim at the time of his death, and which were afterwards entered by his administrator in the name of his heirs.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Jesse M. Burns, against the administrator and heirs-at-law of Milton B. Hamilton, deceased, on the 16th April, 1849. The facts on which the complainant predicated his claim to relief, as stated in the bill, were these:

Milton B. Hamilton died, in Cherokee county, Alabama, in August, 1839, being in possession of a tract of land which he had been cultivating for several years, but which belonged to the United States. In the spring of 1843, his administrators made application to the land-office at Lebanon, claiming that their intestate had a pre-emption right to the land, paid the purchase-money, and obtained a certificate of entry in his name. On the 10th April, 1844, the register of the land-office at Lebanon, being instructed by the commissioner of the general land-office at Washington that this certificate was improperly issued, issued another certificate of entry in the name of "the heirs of Milton B. Hamilton;" and a patent was issued to them, by that description, on the 1st May, 1845. On the 2d February, 1844, the administrators in chief having resigned and been removed, letters of administration *de bonis non* on the estate of said decedent were granted to John Chapman, who, on the 5th April, 1844, filed a petition in the orphans' court of Cherokee county, asking an order to sell this land for the purpose of paying the debts of the estate. Under this petition, the court granted an order of sale on the 7th September, 1844; and the land was sold under this order, at public outcry, on the 31st of October, 1844, the complainant becoming the purchaser. "At the time of said sale, complainant and his agent, Samuel Burns, by whom the purchase was made, were totally ignorant that there was any defect in the title to said land, or that the title to the same did not pass by the said sale; and complainant was ignorant that the first certificate had been improperly issued, and that a second one had issued, and remained thus ignorant

until after the execution of his note for the purchase-money, as hereinafter stated."

The terms of the sale required a part of the purchase-money to be paid in cash, and the balance in six months; but the cash payment was not made until the 8th February, 1845, when a note, with two sureties, was also given for the balance, ante-dated as of the day on which the sale was made; and the administrator then executed a written instrument, under seal, acknowledging the receipt of the money and note, and binding himself, "so soon as said sale shall be confirmed," to make to the complainant, "pursuant to the order of the court, such deed for said land as" he might be "by law authorized and required to make." The administrator's report of the sale was confirmed by the court in February, 1845; but it does not appear that any deed was executed to the complainant. Soon after the maturity of the note for the balance of the purchase-money, the administrator brought suit on it, and recovered a judgment against all the parties thereto in April, 1849. The complainant attempted to defend the suit, on account of the failure of consideration; but the circuit court ruled, that he could not set up that defense while retaining possession of the land.

The complainant offered in his bill to account for the rents and profits of the land, while in his possession; and prayed, that the purchase-money paid by him might be refunded, that the judgment might be enjoined, and for other and further relief.

The chancellor dismissed the bill, for want of equity; and his decree is now assigned as error.

M. J. TURNLEY, for the appellant.

ALEX. WHITE, *contra*.

RICE, C. J.—The rule, "*caveat emptor*," applies to sales of land under the order of the probate or orphans' court. A purchaser at such a sale buys at his peril. Although he may pay the purchase-money, and get no title; yet, if he obtained no warranty, and if at the time of the sale there was no fraud, and no mistake or igno-

rance of any material *fact*, he has no right to relief in a court of equity. He cannot found a right to relief on his mere ignorance or mistake of *law*.—Haden v. Ware, 15 Ala. 149.

Tested by these principles, the complainant's bill shows no right in him to relief. True, he alleges that, at the time of the sale, and up to a period subsequent to February, 1845, and to the execution of the note for the residue of the purchase-money, he was "ignorant that there was any defect in the title to said land, or that the title to the same did not pass by the said sale," or that "the first certificate had been *improperly* issued, and that a second one had issued." But, construing these allegations most strongly against him, as it is our duty to do, we are bound to take them as allegations of his mere ignorance of the *legal effect* of the *known facts*. He does not pretend in his bill that he was ignorant of any of the following facts: that the intestate, at the time of his death, had nothing but a pre-emption right; that no entry of the land had been made at his death; that after his death the pre-emption right was established by his administrators, and the land entered by virtue thereof. These facts being known to the complainant at the time he purchased at the sale made under the order of the orphans' court, it was immaterial whether he knew in whose name either of the certificates had issued; for, no matter in whose name they issued, the sale of the land as the real estate of the intestate, under the order of the orphans' court, could not pass any title to the purchaser, for the reason, that at the time of his death, the intestate had no title, either legal or equitable, *to the land*, and no such interest therein as could be sold by order of any court.—Johnson v. Collins, 12 Ala. R. 322; Pettit v. Pettit, at last term; Cothran v. McCoy, at this term. And if with a knowledge of these facts, the complainant purchased at the sale under the order of the orphans' court, without fraud, and without any warranty, he has no right to call upon a court of equity to relieve him.—Jennings v. Adm'r's of Jenkins, 9 Ala. 285; Worthington v. McRoberts, 9 Ala.

297; Pool v. Hodnett, 18 Ala. 752; Ricks v. Dillahunt, 8 Porter, 133.

The decree of the chancellor is affirmed, at the costs of the appellant.

TAYLOR AND WIFE vs. KILGORE.

[BILL IN EQUITY BY GUARDIAN AGAINST WARD FOR REIMBURSEMENT.]

1. *When guardian is entitled to reimbursement for expenses of unsuccessful litigation.*
A guardian who, in the institution of a suit in the name and for the benefit of his ward, acts in good faith and on reasonable grounds, is entitled to reimbursement of the costs and expenses, notwithstanding his failure in the suit.
2. *Allowance of solicitor's fees.*—A fee of \$500, paid by the guardian to the solicitor by whom the suit in equity was conducted, held a proper item for reimbursement, on proof that the fee was reasonable, and that the solicitor was a man of good professional reputation; the other circumstances in the case being deemed sufficient to show that, by the contract of employment, his fee was not made dependent on the success of the suit.
3. *Costs of amendment allowed.*—Where it appears that the guardian had employed competent counsel, he is entitled to reimbursement of the costs imposed on him, as the terms on which an amendment of his bill was allowed.
4. *When statute of limitations begins to run between guardian and ward.*—A right of action does not accrue to a guardian against his ward, for reimbursement of the costs and expenses attendant on the unsuccessful prosecution of a suit, until the termination of the guardianship; and the ward's removal to another State does not affect the principle.
5. *Appointment of foreign guardian.*—The appointment of a guardian for an infant, on the petition of its mother and sole surviving parent, by the court of equity of a foreign State, in which the domicile of the infant and the greater portion of its property then were, cannot be held invalid or irregular, when collaterally attacked, because its mother was then a married woman, and the infant, who was not of an age to select its own guardian, was not made a party to the proceeding.
6. *Authentication of foreign transcript.*—A certificate, appended to a transcript from the records of the court of equity in South Carolina, in these words: "I, J. J., one of the chancellors of the State of said State, and, in turn, presiding chancellor for said district, do hereby certify," &c., appears on its face to be made by the proper person, and conforms to the requisitions of the act of congress.

7. *Exceptions to master's report.*—Under an exception to the master's report, on account of the allowance of an item in the statement of an account, a party cannot avail himself of the objection that secondary evidence was admitted without the proper predicate: an objection should be made to the testimony when offered, and an exception taken to the overruling of the objection.
8. *Re-statement of account.*—If the chancellor, in ordering a re-statement of an account by the master, by mistake directs him to allow one item and reject another, while the opinion shows that he intended the latter item to be allowed and the former rejected, it is nevertheless the duty of the master to follow the decree, and not the opinion.
9. *Costs of procuring attendance of witness.*—The amount paid by the guardian, in procuring the personal attendance of a female witness, who resided more than one hundred miles from the place where the suit was pending, is not a proper item for reimbursement, in the absence of proof that the law authorized that method of procuring testimony, or that peculiar circumstances required it.
10. *When judgment against husband and wife is proper.*—In a chancery suit against husband and wife, by the wife's late guardian, for reimbursement of the costs and expenses of litigation on her account, if it appears that the husband received property by his wife, exceeding the amount of the plaintiff's demand, the "woman's law" of 1846 (Session Acts 1845-46, p. 25, § 6) authorizes the rendition of a joint decree against him and his wife.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed on the 22d April, 1848, by Josiah Kilgore, against Samuel H. Taylor and wife, and sought to recover from the defendants reimbursement for costs and expenses incurred by the complainant as guardian of Mrs. Taylor, then Miss Ramsey, in the unsuccessful prosecution of a chancery suit in South Carolina. The facts out of which the case arose, as shown by the bill, answer and proof, are briefly these: Mrs. Taylor's father, John Ramsey, died in South Carolina, some time prior to 1832, bequeathing all his property, real and personal, to his widow for life, with remainder to his only child, then an infant. In 1832, the widow married John H. Joyce, from whom she separated in 1834. When on the eve of this marriage, she executed a deed, conveying all her interest in the estate of her late husband to her daughter; which deed appears to have been executed without the knowledge or consent of her intended husband. In July, 1836, on the application of Mrs. Joyce, who was still living separate and apart from her husband, the com-

plainant was appointed guardian of Miss Ramsey by the court of equity of Greenville district, South Carolina, and soon after instituted a suit in equity against the said John H. Joyce, for the purpose of establishing the said conveyance, and obtaining the possession of the property. At the time this suit was instituted, the complainant knew that Joyce contested the validity of the deed. The bill was filed originally in the name of the complainant, as guardian of Miss Ramsey; but an amendment was afterwards allowed, on payment of costs, and the suit was prosecuted in the name of the ward. An issue at law was directed, to test the validity of the deed; and the cause was finally decided against the complainant, both in the chancery court, and in the court of appeals. The costs and expenses incurred by the complainant in that suit, are the foundation of the present suit.

The defendant filed a joint answer; insisting that the complainant's letters of guardianship were void, for want of jurisdiction in the court by which they were issued, and that the suit in South Carolina was instituted under circumstances which deprived the complainant of all claim to reimbursement; pleading the statute of limitations; and demurring to the bill, for want of equity.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and ordered a reference of the matters of account to the master. The chancellor's decree, together with his rulings on the testimony, and on the exceptions to the master's report, which require no particular notice, is now assigned as error.

I. W. GARROTT, for the appellants.

J. R. JOHN, *contra*.

WALKER, J.—The authorities cited authorize us to assume in the outset of this opinion, that if the complainant, as the guardian of Miss Ramsey, acted in good faith, and upon reasonable ground, in the institution of the suit in equity in Greenville district, South Carolina, he is entitled to reimbursement of the costs and expenses of the litigation.—Apt v. Bean, 8 N. Hamp. 15; Mathes v.

Bennett, 1 Foster, 204; In the matter of Hopper, 5 Paige, 289; Pearson v. Darrington, 32 Ala. 227; Savage v. Dickson, 16 Ala. 257; Alexander v. Alexander, 5 Ala. 517; Bendall v. Bendall, 24 Ala. 295; Pinckard v. Pinckard, 24 Ala. 250. A guardian, who acts at his peril in omitting suits in behalf of his ward, and who must, of necessity, be allowed some discretion as to the propriety of settling by judicial decision questions involving the rights of his ward, should never, when he acts *bona fide*, be denied reimbursement in consequence of a failure in the litigation, unless he has acted with such heedlessness as to amount to misconduct. It was not designed in Savage v. Dickson to prescribe a rule variant from the principle above stated.

In the institution of the suit in South Carolina, the guardian had no conceivable motive or interest to induce him to act *mala fide*. In the institution of the suit, he acted under the advice of counsel learned in the law, and of unquestioned integrity, who appears to have been fully informed of all facts, pertaining to the case, which were known to the complainant. There is, therefore, no just reason for the imputation of bad faith.

The main question in the suit in Greenville district, South Carolina, was, whether certain deeds, made by Mrs. Joyce pending an engagement to marry, were fraudulent as to the husband, whom she married in a short time in pursuance to that engagement. Those deeds were valid, if, under the law as it existed in South Carolina, a voluntary conveyance by a woman contemplating marriage, without the knowledge of the intended husband, would be valid, because it made provision for her only child; or if in fact the deeds were made with the knowledge or consent of the intended husband. How far a woman, pending a contract to marry, may go in making provision for the child of a former marriage out of her estate, without the knowledge of the intended husband, is a question as to which there is a conflict of authority.—St. George v. Wake, 1 Myl. & K. 610; 1 Story's Equity, § 273; De Mandeville v. Crompton, 1 Ves. & B. 354; Hunt v. Matthews, 1 Vernon, 408. There are expressions in the books,

as will be seen by reference to the authorities cited, which concede great potency to the fact that the conveyance is made to a child, in proving the *bona fides* of the conveyance. The court of appeals in South Carolina had, before the commencement of the suit in that State, intimated by remarks in its decisions, that the case where the deed is made to provide for children constituted an exception to the general rule, that the voluntary deed of a woman conveying away her property in contemplation of marriage without the knowledge of the intended husband was fraudulent. It appears from the decision by the court of appeals of South Carolina, given in evidence, that that court in two cases had added, "unless it be to provide for children," to a statement of the general principle, which avoids voluntary conveyances pending the treaty of marriage without the husband's knowledge. It is true, the apparent exception of the case of a conveyance to children may have been an incidental remark, scarcely deserving to be characterized as a *dictum*; yet it was an indication of the opinion of the appellate court, which, though not binding upon that tribunal, might well be regarded by a lawyer, in determining the propriety of suing. Especially was it a proper subject of consideration when, as remarked by Lord Brougham, there was so "little positive decision" upon the point, and some conflict of authority. To this it may be added, that the South Carolina court of appeals evidently regarded, and in effect decided, that the state of the law in reference to the point was such as to induce that probability of success, which justified the institution of the suit, involving so large an interest. The court says in its opinion in the case, alleged to have been improperly brought by the guardian: "It was certainly no violation of the duty of a guardian to obtain the judgment of the court on an instrument, in which his ward had *apparently* so deep an interest; and it would be hard and unusual to burden him with the costs. By paying costs out of the *corpus* of the property, they will be borne by the tenant for life, and the complainant entitled in remainder, according to their respective interests. This is ordered accordingly, &c."

This we regard as an adjudication in favor of the propriety of the suit, which is entitled to great weight, as it comes from the court which best knew the state of the law in reference to which the guardian acted.

In support of the conclusion to which the foregoing view of the law persuades us, it is to be observed, that there appears to have been some reaason for believing that the husband's knowledge of the deeds before the marriage could be proved. The record discloses, that the chancellor from the record entertained sufficient doubt upon the question to order an issue for its trial by a jury. The chancellor says: "On this point a good deal of testimony has been offered; and if it were necessary, I could solve it, but not to my entire satisfaction." Besides, the guardian was assured by Mrs. Joyce, who certainly knew, that her husband consented that she might make such conveyance; and it is proved in this case that she actually produced a witness who so testified. It is true, that Mr. Joyce informed the guardian before the suit was brought, that he had no knowledge of the making of the deed; but such representation by Joyce would have been no protection to the guardian for the failure to sue, and he was not bound to act upon it.

There are other points of view in which the propriety of bringing the suit is argued; but we are content to rest our conclusion in favor of the complainant upon the reasons adduced by us, without considering the others advanced in argument.

[2.] It is contended for the appellants, that the guardian wrongfully paid the fee of B. F. Perry, one of the solicitors engaged in the prosecution of the suit in equity, because there was a contract with him that his fee should be conditioned upon success in the case. The complainant proves by Mr. Perry, that he made no such contract; that such a contract would have been inconsistent with his uniform practice, and would have been unreasonable when considered in reference to the labor bestowed and the value of the interests involved. The testimony of Mr. P. is in some degree fortified by evidence that his fee was reasonable, and that his professional reputation was

good, as well as by the improbability of the complainant's paying under the circumstances money not due.

The two witnesses supposed to contradict Mr. Perry's statement are Mrs. Joyce and Mr. Jenkins. These witnesses gave their evidence thirteen years after the transaction of which they speak. Mrs. Joyce acknowledges her deficiency of memory as to other matters; and, indeed, the frailty of her memory is fully attested by the difference between her answer to the bill in equity, and her deposition, in reference to the material matter of her husband's consent that she should convey her property before her marriage. Besides, it is fairly inferrible from the deposition of Mrs. J., that she was not present at the time when the alleged contract was made, and therefore cannot assert that it was made from her own knowledge. If this mooted question of fact is decided for the appellants, it must be upon the ground that the testimony of Jenkins and Perry is in irreconcilable conflict, and that superior credit is to be given to Jenkins. The time of the alleged contract was before the appointment of the guardian, and when Mrs. Joyce regarded herself as the guardian by virtue of her first husband's will. Jenkins says, he went for Mrs. Joyce to see Perry and make the contract with him. The entire communication between them was verbal. Jenkins had no interest in the matter, and there is no reason assigned why the terms of the contract should be impressed with any peculiar force upon his memory. It would be remarkably strange that a lawyer, proved to be a man of professional competency, should, in advance of the appointment of the guardian, by whom the suit was to be brought, make a binding contract with one not only unauthorized to bind the anticipated guardian, but incompetent from coverture to bind herself. Jenkins does not apply the contract with distinctness to the suit. It is much more reasonable to conclude, that after the lapse of so long a time, Jenkins has applied a conversation in reference to some suit contemplated by Mrs. Joyce, to the suit afterwards brought by the guardian, or that from frailty of memory, or any other cause, he has misrepresented the facts, than to conclude, that a

contract, unreasonable and improbable in itself, not providing a compensation adapted to the case, and inconsistent with the uniform practice of the party, was made; and that Perry has denied it falsely, either from design or forgetfulness; and that the guardian has paid it, being under no obligation to do so, when his interest was opposed to such payment.

[3.] The complainant was entitled to reimbursement of the costs imposed upon him, as the terms upon which an amendment of his bill was allowed. He had employed competent counsel, and the error was in no wise attributable to him.

[4.] The statute of limitations cannot avail the defendants. The right of action did not accrue, until the termination of the guardianship within less than six years before suit brought.—*Davis v. Ford*, 7 Hammond, (Ohio,) 441. The removal of the ward from the State of South Carolina could not authorize the guardian to sue before the relation of guardian and ward was dissolved. The right of suit cannot be dependent on the place of the ward's residence.

[5.] We are led by the evidence to the conclusion, that both the domicile of the ward and major portion of the estate were in South Carolina at the time of the appointment of the guardian; and that, therefore, the appointment of a guardian appertained to the jurisdiction of the tribunals of that State. The chancery court had, at common law, original jurisdiction over the appointment of guardians for infants; and that jurisdiction was exercised in a summary manner, upon petition.—3 Dan. Ch. Pl. and Pr. 2076 to 2079. The petition here was filed by the mother, the only surviving parent of the infant; the infant was not of an age to select her guardian, and the proceedings do not seem to be even irregular. We can not intend that the court of equity of South Carolina did not have the jurisdiction which it exercised, especially as it was a jurisdiction which originally appertained to courts of equity; and it is no objection to the validity of the appointment that the infant was not made a party. The jurisdiction over the guardianship having attached,

the removal of the ward and her property from the State could not divest that jurisdiction.

[6.] There was no error in overruling the objection to the chancellor's certificate, verifying the transcript of the record of the chancery court of Greenville district, South Carolina. The certificate of the chancellor commences as follows: "I, Job Johnson, one of the chancellors of the State of the said State, and *in turn presiding chancellor for Greenville district*," &c. We understand the chancellor thus to assert, that he was one of the chancellors of the State, and was *in his* turn the presiding chancellor of the particular district at the date of his certificate. He was, therefore, the proper person to make the certificate. Where the chancellors are commissioned for the State at large, and not for any particular portion of the State, and where they preside *in turn*, it is a strict compliance with the act of congress for the chancellor who *in his turn* is presiding to make the certificate.—See the case of Stephenson v. Bannister, 3 Bibb, 369; Greenleaf on Evidence, 551, § 506.

It is unnecessary for us to consider the chancellor's rulings against the appellant upon the complainant's objections to testimony, because the testimony excluded could not have the slightest effect upon the result of the case.

It remains for us to pass upon the decree of the court below so far it overrules the defendants' exceptions to the register's report.

[7.] The first exception was properly overruled. The items mentioned in the exception were adequately supported by the testimony. If the testimony was objectionable, because it proved by parol the contents of a receipt or other paper without sufficiently accounting for the absence of the original, it was ground of objection to the testimony; and the improper overruling of the objection might have been made the predicate of an exception to the report. The party cannot, under an exception to the allowance of the item, avail himself of the objection that secondary evidence was admitted without the proper predicate.

[8.] There is no proof either of the payment to Holan-

quist of the tuition, or of the reasonableness of the amount charged; and the two items 4 and 11 were not established. The decree sustains the second exception; but the opinion discloses, that it was done by mistake. The 3d was intended to be sustained. The register deducted items 7 and 18, which were the subject of the 3d exception, from the account. The defendants therefore have no ground of complaint as far as those two items were concerned. As to items 4 and 11, embraced in exception 2, the register was instructed by the decree, upon the re-statement of the account, to reject them; and for his error in not doing so, the defendant should have objected to the account as re-stated. It was his duty to have followed the decree, and not the opinion. Exception 2 was sustained, and therefore the defendant cannot complain so far as it is concerned. Exception 3 was not sustained by the chancellor; but the defendant got the benefit of the exception in the exclusion of the items objected to through the mistake of the register in following the opinion instead of the decree.

The account of Powell was proved by the depositions to have been correct, and to have been paid by complainant, and the articles in the account appear to have been suitable and proper for the young lady at the time; and we will not, in the absence of evidence, presume the contrary. Exceptions 6 and 8 applied to the costs imposed as the terms of the amendment to the bill in equity in South Carolina, and the solicitor's fees; and we have already passed upon them.

[9.] The 7th exception is to the allowance of items 33, 34, and 36, which were for payments made to John W. Fowler and P. T. Fowler, for bringing a female a distance of a hundred miles to testify in the South Carolina equity suit. We know of no presumption of law, which can sustain those charges. The necessity of sending after the witness is not proved. We cannot presume that the law of South Carolina imposed such duty upon a party desiring the testimony of a witness. The presumption is, that the attendance of the witness could be coerced by subpœna. If there existed any peculiar circumstances,

rendering it necessary or expedient to send for the witness, or if any law of South Carolina devolved such duty upon the party desiring the testimony, it should have been proved. The chancellor erred in overruling the objection to these items; and the decree of the court below must for that error be reversed, and a decree must be here rendered for the amount of the original decree, less \$9792, the aggregate of those items and interest upon them; and the decree here rendered must bear interest from the date of the decree in the court below. The appellant must pay the costs of the court below, and the appellee must pay the costs of this court.

[10.] There was no statute before the commencement of this suit, which could make it improper to render judgment against the husband. He received by his wife property largely exceeding the amount of the decree, and, under the act of 31st January, 1846, he would be liable. See Pamphlet Acts of 1845-6, 25, § 6.

VINCENT vs. ROGERS.

[ACTION FOR MONEY HAD AND RECEIVED.]

1. *When assumpsit lies against trustee or bailee.*—Where money is deposited in the hands of a trustee or bailee, for the use and benefit of a minor, to be expended by him in defraying the charges of her clothing, schooling and other necessary expenses, under a contract which would authorize the minor, on attaining majority, to maintain an action for money had and received, if a balance had been ascertained against him on settlement, or if he never entered on the discharge of the fiduciary duties devolved on him,—the fact that the trustee, in a former action brought against him by the minor, under appropriate issues, proved all the expenses incurred by him under the contract, and the plaintiff then recovered a judgment on verdict against him, which judgment is unreversed, restores the plaintiff's right of action on the contract, as if the trustee had never entered on the discharge of his duties, or a balance had been ascertained against him on settlement.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Sarah J. Vincent, against Mills Rogers, and was founded on a writing which is in these words :

“ Washington, Ala., January 1, 1844.

“ This is to certify, that Joseph H. Vincent deposited in my hands four hundred dollars on the 1st May, 1842, for the use and benefit of Sarah J. Vincent, to be kept for her use and benefit ; which amount of money is to bear the lawful interest of eight per cent. *per annum*. And it is agreed, that I am to furnish the said Sarah J. Vincent what amount of clothing, schooling, and other probable expenses, as I may think necessary, and am to be allowed of said expenses to be deducted from the said deposit of four hundred dollars in my hands. MILLS ROGERS.”

At the January term of this court, 1857, the judgment of the circuit court on a former trial was reversed, and the cause remanded.—See the report of the case in 30 Ala. 471. After the remandment of the cause, the plaintiff filed an “ amended and additional complaint,” which was as follows :

“ 1. The plaintiff claims of the defendant, also, another sum of four hundred dollars, due to plaintiff by a written agreement made by defendant on the 1st January, 1844, which agreement is substantially as follows : ” (setting it out as above copied.) Plaintiff avers, that said agreement and said money due thereon is her property and right ; that she was a minor, under the age of twenty-one years, when said agreement was made ; that she became and was of age before this suit was brought, to-wit, on the 1st December, 1853 ; that before this suit was brought, to-wit, on the 1st December, 1853, she demanded of defendant the money due to her under and by virtue of said agreement, and of the facts aforesaid ; and that defendant wholly failed and refused to pay her said sum of money, or any part thereof. Plaintiff avers, also, that at the fall term of said circuit court of Autauga county, 1853, plaintiff, then a minor, suing by her next friend, Joseph H. Vincent, recovered a judgment against said defendant ; that in said suit, which was for work and labor done for defendant by plaintiff, the defendant filed, with other

pleas, the pleas of set-off and payment; that plaintiff took issue thereon; that on the trial thereof, the defendant gave evidence of money paid by him for schooling of plaintiff, and of money paid by him for clothing plaintiff, and of the value of her board furnished by defendant, and of the value of books furnished her by him; that said account for board, schooling, clothing and books, furnished plaintiff by defendant, were for her board, clothing, schooling and books furnished her during the whole period she lived with defendant, and for the whole period that he acted as her trustee, to-wit, from the 1st May, 1842, to the 1st January, 1852; that these items were all the items which he had expended for and on her account; that the jury considered of said items, and gave a verdict, in favor of the plaintiff in said action, of \$—; that the judgment of the court was thereon rendered in favor of the plaintiff, and that said judgment has never been reversed. And plaintiff avers, that said defendant has never incurred any other expense on her account, and has not furnished to her since the commencement of said suit any money, clothing, schooling, books, board, or any other thing whatever, nor has he incurred any liability since the commencement of said suit on her account; that since the commencement of said suit he has ceased to act in any way for her, as trustee, or friend, to-wit, since the 1st January, 1852; that there is no account of said trust to be entered into and had between plaintiff and defendant, on account of any expenditures under and by virtue of said instrument declared upon as above; and that the whole sum of four hundred dollars, with interest from the 1st day of May, 1842, is due and owing to her, exclusive of any and all demands of defendant, which demands were passed upon and adjudicated in the trial aforesaid.

“2. The plaintiff claims of the defendant, also, the further sum of four hundred dollars, due to plaintiff by a written agreement made by defendant on the 1st day of January, 1844, which is substantially as follows,” (copying the agreement.) Plaintiff avers, that said agreement, and said money due thereon, is her property and right;

that she was a minor, under the age of twenty-one years, when said agreement was made; that she became and was of age, to-wit, of the age of twenty-one years, before this suit was brought, to-wit, on the 1st day of December, 1853; that before this suit was brought, to-wit, on the 1st December, 1853, she demanded of said defendant the money due to her under and by virtue of said agreement, and of the facts aforesaid; and that said defendant wholly neglected and refused to pay her said sum of money, or any part thereof. And plaintiff further avers, that at the fall term of the circuit court of said county of Autauga, 1853, plaintiff, then a minor, suing by her next friend, Joseph H. Vincent, recovered a judgment against said defendant; that in said suit, which was for work and labor done by plaintiff for defendant, the defendant filed, with other pleas, the pleas of set-off and payment, and plaintiff took issue thereon; that on the trial thereof, the defendant gave evidence of money paid by him for schooling of plaintiff, and of money paid by him for clothing plaintiff, and of the value of her board furnished her by defendant, and of the value of books furnished her by him; that said account for board, schooling, clothing and books, furnished to her by defendant, were for her board, clothing, schooling and books furnished her during the whole period she lived with defendant, and for the whole period that he acted as her trustee, to-wit, from the 1st May, 1842, to the 1st January, 1852; that these items were all the items he had expended for and on her account; that the jury considered upon said items, and gave a verdict in said suit, in favor of the plaintiff, of \$—; and that the judgment of the court was thereon rendered in favor of the plaintiff, which judgment has never been reversed. And plaintiff avers, that said defendant has never incurred any other expenses on her account, and has not furnished her since the commencement of said suit any money, clothing, schooling, books, board, or any other thing whatever; that he has not incurred any liability on her account since the commencement of said suit; and that since the commencement of said suit he has ceased to act in any way for her as trustee or friend,

to-wit, since the 1st January, 1852. And plaintiff avers, that there is no account of said trust to be entered into and had between plaintiff and defendant, on account of any expenditures under and by virtue of said instrument declared on as above; and that the whole sum of four hundred dollars, with interest thereon from the 1st May, 1842, is due and owing to her, exclusive of any and all demands of defendant, which demands were passed upon and adjudicated in the trial aforesaid. And plaintiff further avers, that heretofore, to-wit, on the 1st December, 1853, a settlement was had between plaintiff and defendant, of all matters of expense for board, clothing, schooling and other expenses incurred by defendant on account of plaintiff, and a balance struck; and that the sum of four hundred dollars, with interest from the 1st May, 1842, is the balance due to plaintiff, for which she sues."

The court sustained a demurrer to each of these counts, leaving only the common counts in the complaint. On the trial, as the bill of exceptions states, after the plaintiff had read in evidence the writing above copied, "the defendant introduced in evidence facts tending to show that, from the 1st May, 1842, to the 1st January, 1852, he had paid money for the board, clothes, and schooling of the plaintiff during that time. The plaintiff then introduced the records of the court, showing that, at the spring term, 1852, of said circuit court, she, by her next friend, sued the defendant for work and labor; that the defendant pleaded set-off and payment, and, under the plea of set-off, proved a large amount of money paid out and expended by him, between the 1st May, 1842, and the 1st January, 1852, for board, clothing, schooling, and other expenses of plaintiff; that he boarded her a part of the time, and the value thereof. The record showed a verdict for plaintiff of *one cent*, the judgment of the court thereon, and that said judgment is unreversed. This being all the evidence, the court charged the jury, that if they believed the evidence, this court has no jurisdiction of the cause, and the plaintiff cannot recover; to which ruling of the court the plaintiff excepted."

In consequence of these rulings of the court, the plaintiff

was compelled to take a nonsuit, which she now moves to set aside.

ELMORE & YANCEY, with WM. H. NORTINGTON, for the appellant, cited Vincent v. Rogers, 30 Ala. Rep. 471; Guernsey v. Carver, 8 Wendell, 492; Stevens v. Lockwood, 13 Wendell, 644; Evans v. Billingsley's Adm'r, 32 Ala. 395; 2 Rich. (S. C.) Rep. 560.

WATTS, JUDGE & JACKSON, with BYRD & MORGAN, *contra*, cited Hitchcock v. Lukens, 8 Porter, 333; Wilson v. Seargent, 12 Ala. 778.

STONE, J.—When this case was heretofore in this court—January term, 1857—we held, that the written contract declared on, *per se*, created a *prima-facie* debt, on which an action at law can be maintained; but, we added, “if, in pursuance of the apparent intention of the instrument offered in evidence, Rogers entered upon and executed, either in whole or in part, the duties which he seems to have taken upon himself, we are satisfied no action at law can be maintained on the contract, until a settlement is had, and a balance struck.”

In another place we said, “If, on the other hand, Mr. Rogers has incurred no expenses or liabilities for Miss Vincent under said agreement, or if a settlement has been had and a balance struck, then an action at law is clearly maintainable.”

On the former trial, nothing was presented before us but the written contract; and hence we only pronounced on the *prima-facie* intendments, and what would overturn them. The present record raises a question not presented by the former one. The amended complaint avers, that in a former suit by the present plaintiff against the present defendant, and under appropriate issues, evidence was given by the defendant of all items of board, schooling, clothing, &c., which he ever incurred for and on account of the plaintiff; that the jury considered upon said items, and gave their verdict; that the court gave judgment thereon, which judgment has never been re-

versed; and that these are the only items of expense ever incurred by defendant for the plaintiff. These averments are drawn out with great particularity, and omit no material fact, necessary to the proper pleading of a former recovery. If the averments in the amended complaint be true, this case, in its legal bearings, must stand as if the parties had come to a settlement, and plaintiff had paid to defendant all items of charge and expense incurred on her account.—*Evans v. Billingsley's Adm'r*, at the last term, and authorities therein collected. The demurrer admits the truth of every thing that is well pleaded. This being the case, the written contract must stand restored to the state it would be in, if Mr. Rogers had never incurred any expense or liability for plaintiff, and an action at law can be maintained on it.—See, also, *Cowen & Hill's Notes to Phil. Ev.* (edition by Van Cott,) part II, page 164.

The judgment of the circuit court is reversed, nonsuit set aside, and the cause remanded.

ACKER *vs.* BENDER.

[DETINUE FOR SLAVES BY MORTGAGEE AGAINST MORTGAGOR.]

1. *Title to personally may pass by parol.*—The title to personal property, although acquired by an instrument under seal, may pass by a parol contract.
2. *Release of mortgage by subsequent parol contract.*—A mortgage of personal property, so far as it conveys the title to the property to the mortgagee, may be released or discharged by a subsequent verbal contract: either an agreement by the mortgagor to do certain things, or the performance of those things by him, may be made the ground of settlement or discharge.
3. *Waiver of performance of condition.*—A party may always waive and dispense with the performance of a condition in his favor.
4. *Construction of contract.*—In the construction of verbal contracts, the conduct and acts of the parties in carrying out their engagements may be regarded, in order to see what interpretation they have themselves adopted, and what conditions have been waived or performed.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Griffin M. Bender, against Mrs. Sarah E. Acker, and was commenced on the 5th January, 1857. The defendant pleaded *non detinet* "in short by consent, with leave to give in evidence any matter that is a bar to the action." The slaves in controversy were claimed by the plaintiff under a mortgage executed to him by Mrs. Acker and her husband, dated the 1st August, 1854, which was given to secure the payment of two notes, for over \$3,000 each, executed by Mrs. Acker and her husband to said Bender, for the indebtedness of the husband, and also to indemnify Bender against loss on several notes which he had signed as surety for Acker; which mortgage contained a power of sale, on default being made in the payment of any of the secured notes, the first of which fell due on the 1st January, 1855. Mrs. Acker claimed the slaves as belonging to her under a marriage settlement, dated the 24th October, 1839, which secured her property to her separate use; and also under a contract with the plaintiff, executed subsequently to the mortgage, by which he released his interest in the slaves.

In relation to this contract, Dan'l Chandler, whose deposition was taken by the defendant, testified as follows: "I drew the mortgage from Acker and wife to Bender. After Acker's death, Mrs. Acker called on me, and stated, that her property had been settled and secured to her by a marriage settlement, and that she was advised the mortgage would not bind it. I told her, that I did not know how that was; but stated, that if that was the case, it was unfortunate that she had joined in the mortgage. Bender afterwards called on me to consult me in relation to the matter. I told him, that Mrs. Acker had spoken to me, and suggested that he should employ some other attorney. He did not think it necessary, but supposed the matter could be arranged; he did not wish to injure Mrs. Acker and her children, but was willing to make any arrangement without going to law if his debt could be secured. The marriage settlement was then produced by Mrs.

Acker, and, for the first time, I read it audibly in the hearing of the parties. I then stated to Mr. Bender, that Mrs. Acker informed me that she had got advice as to her rights under the deed, and was determined to assert them; that if he attempted to enforce the mortgage, there would necessarily be litigation; and that I hoped the matter could be settled without his sustaining any loss, and without Mrs. Acker's losing her negroes. Much was said between the parties, and the kindest feelings were expressed. After various suggestions and propositions, it was finally agreed, that Mrs. Acker should convey to Bender certain lands claimed and owned by her, and some personal property, consisting of mules, wagons, potatoes, wood, wood-boat, &c., and that Bender should release from his mortgage the negroes which belonged to Mrs. Acker. It was agreed, that she might take the negroes on her return to Dallas, and that she should send me the certificates for the land; and a deed was to be drawn, conveying the land to Mr. Bender, and he was to take the personal property. With this arrangement both parties seemed to be satisfied."

There was other evidence in the case, touching the question of performance of this agreement and other matters, and several exceptions were reserved to the rulings of the court below on this evidence; but the view taken of the case by the appellate court renders these matters immaterial.

The court charged the jury, among other things,—

"1. That unless the agreement made between plaintiff and defendant, as shown by the evidence of Daniel Chandler, was an executed agreement, it would be no defense to this action.

"2. That the agreement between plaintiff and defendant, as shown by the evidence of Daniel Chandler, was not such an executed agreement, as would release the slaves sued for from the mortgage."

The defendant excepted to each of these charges, and then requested the court to instruct the jury as follows:

"1. That if they believed from the evidence that Mrs. Acker delivered the possession of the potatoes, wood and

mules to Bender, according to the agreement, and tendered him a deed for the lands which she promised to convey; and that Bender refused to receive the same, but delivered the negroes sued for under said agreement,—then it was not necessary that he should have released the negroes sued for from the mortgage, in order to entitle the defendant to a verdict in this action.

“2. That if the plaintiff delivered the negroes sued for, in pursuance of the agreement shown by the evidence, then he was not entitled to recover in this action.”

The court refused both of these charges, and further instructed the jury, “that a subsequent partial performance of the parol agreement shown by the evidence would be no bar to the plaintiff’s recovery in this action—that said agreement, in order to make it a bar, must be shown to have been fully executed by the parties.”

The defendant excepted to the charges given by the court, as well as to the refusal of the charges asked; and she now assigns them as error, together with the rulings of the court on the evidence.

BYRD & MORGAN, for the appellant.

ALEX. WHITE, and N. R. H. DAWSON, *contra*.

RICE, C. J.—Upon a careful examination of this case, as now presented, we think it unnecessary to express our opinion upon many of the questions raised. It is evident that the case was tried and decided in the court below without a due regard to certain well settled principles, some of which we now proceed to state.

The title to *personal property* may pass by parol. The right or capacity thus to pass it is not destroyed or diminished by the mere fact, that it was acquired by an instrument under seal. A mortgage, although under seal, is a security for the payment of a debt. So far as it conveys to the mortgagee title to personal property, he may release or discharge it, by a sufficient parol agreement—by a subsequent valid verbal contract.—Wallis v. Long, 16 Ala. 738; Deschazo v. Lewis, 5 Stewart & Porter, 91; Addison on Contracts, (edition of 1857,) 1099.

It is competent for the parties to a mortgage, or to any contract, to waive their rights under it, in whole or in part, by substituting another and different contract in lieu of it.—Addison on Contracts, (ed. of 1857,) 1100; Lyth v. Ault, 7 Exchequer R. 669; Young v. Fuller, 29 Ala. 464; Thomason v. Dill, 30 Ala. 444.

The right of a mortgagee to personal property may be agreed to be settled or discharged in one of two ways: “either *an agreement to do* certain things may itself be the ground of settlement or discharge, or *the doing* of these things may be the ground of settlement or discharge.” If the agreement itself is the ground of settlement or discharge, *the doing* of the things agreed to be done is not essential to the validity or efficacy of the settlement or discharge.—Addison on Con. 1100; Flockton v. Hall, 14 Ad. & Ellis (N. S.) 380; Babcock v. Hawkins, 23 Ver. 561; Cartwright v. Cooke, 3 Barn. & Ad. 701; Bradley v. Gregory, 2 Camp. 383; Evans v. Powis, 1 Exchequer R. 601; Very v. Levy, 13 How. Rep. 345.

A man may always waive a condition in his own favor, and dispense with its performance. Every verbal contract is to be interpreted in connection with the surrounding circumstances; and the conduct and acts of the parties, in carrying out the engagement they have entered into, may be regarded in order to see what interpretation they have themselves put upon it, and what conditions have been waived or performed.—Addison on Con. 877–880; Morgan v. Smith, Wykoff and Nicholl, 29 Ala. 283.

The charges of the court, upon the effect of the agreement made by plaintiff and defendant, as shown by the evidence of Daniel Chandler, cannot be reconciled with the principles above announced, and are erroneous. For the error of those charges, we reverse the judgment, and remand the cause, without committing ourselves upon the other questions raised in the record.

FLOYD *vs.* HAMILTON.

[ACTION ON ATTACHMENT BOND.]

1. *Admissibility of attorney's declarations.*—In an action on an attachment bond, the instructions of the attorney of the plaintiff in attachment, to the deputy sheriff by whom the writ was levied, “that he might leave the property as he found it until the sheriff came, but to stay there and watch it,” are not admissible evidence for the defendant.
2. *Admissibility of evidence showing debtor's pecuniary condition.*—In such action, the defendant cannot be permitted to prove that the plaintiff, when the attachment was sued out against him, was embarrassed in his pecuniary affairs and pressed for money, unless the relevancy of the evidence is shown by its connection with some question of fraud.
3. *Calling for question and answer when hearsay.*—The fact that a party, in examining a witness, calls for a question propounded by the witness to a third person, gives him no right to call for the reply, which is mere hearsay.
4. *Damages.*—In an action on an attachment bond, if the attachment was only wrongfully sued out, the plaintiff is entitled to recover the damage actually sustained, which does not include the injury to his wounded feelings; but, if sued out wrongfully and vexatiously, he is entitled also to recover vindictive damages.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Andrew J. Floyd, against John T. Hamilton and others, and was founded on an attachment bond executed by the defendants, for the purpose of procuring an attachment at the suit of said Hamilton against the estate of said Floyd, conditioned that “the said Hamilton shall prosecute his attachment to effect, and pay the defendant all such costs and damages as he may sustain by the wrongful or vexatious suing out of said attachment.” On the trial, the plaintiff reserved several exceptions to the rulings of the court on the evidence, and in the instructions to the jury; all of which are now assigned as error, and which will be sufficiently understood from the opinion of the court.

ELMORE & YANCEY, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

WALKER, J.—The circuit court erred, in admitting evidence of the instructions of the attorney of the plaintiff in attachment, to the deputy sheriff, “that he might leave the property levied on as he found it until the sheriff came, but to stay there and watch the property.” These instructions were but the declarations of a third person, and inadmissible to establish any fact in the case. They may have conduced to show the absence of malice in the attorney, who represented the plaintiff in attachment, in the procurement of the process; but the plaintiff in attachment was not responsible for the malice of his attorney, and cannot be relieved by the want of malice in his attorney.—*Kirksey v. Jones*, 7 Ala. 622–629.

[2.] There were, also, errors committed in the admission of evidence, that the plaintiff in this suit (the defendant in attachment) was embarrassed in his pecuniary matters, and that he was pressed for money. Neither indebtedness, pecuniary embarrassment, nor insolvency is a ground for the obtainment of an attachment. Nor can either justify a wrongful suing out of an attachment, or mitigate the offense of malice in obtaining it. If there were any circumstances, which could make such facts relevant, it was incumbent on the party offering the evidence to show that such connection would be made. If the party designed to raise any question of fraud in a conveyance made or about to be made, which would be affected by the testimony, he should have shown to the court, or offered to show, that the defendant in attachment had disposed, or was about to dispose of his property, so that it might appear that there was a question in the case to which the testimony was relevant.

[3.] There was no error in the rejection of the evidence, offered by the plaintiff, of the reply which his brother returned, when inquiry was made for the plaintiff. The plaintiff himself had called for the question propounded to his brother, and could not make his own act in calling for the question a legal ground upon which to ask for the reply, which was mere hearsay evidence, being the unsworn declaration of a third person.

[4.] There was no error in the giving or refusing of

charges. If the attachment was only wrongfully sued out, the plaintiff was entitled to recover the actual damage. If the attachment was vexatiously as well as wrongfully sued out, the plaintiff might also recover vindictive damages.—McCullough v. Walton, 11 Ala. 492; Kirksey v. Jones, 7 Ala. 622; Shepherd's Digest, 521. The injury to the wounded feelings of the plaintiff was not a part of the actual damage, and could only be regarded by the jury in estimating the damages in the event they found the attachment to have been vexatiously sued out.—Donnell v. Jones, 13 Ala. 490-509.

The judgment of the court below is reversed, and the cause remanded.

MOORE vs. LESUEUR AND WIFE.

[BILL IN EQUITY BY ADMINISTRATOR FOR SETTLEMENT OF ESTATE.]

1. *Jurisdiction of equity over final settlement of decedent's estate.*—The chancery and probate courts having concurrent jurisdiction over the settlement of decedents' estates, the former court will not, in the absence of special equities, take jurisdiction of a final settlement which has been already commenced in the probate court.
2. *Clerical misprision in partial settlement no ground of equitable relief.*—A simple error of calculation in the statement of an account, on a partial settlement had under the act of 1843, (Clay's Digest, 229, § 42,) is amendable in the probate court, *nunc pro tunc*, and constitutes no ground for a resort to equity.
3. *Equitable relief against probate decree.*—An administrator cannot come into equity, to obtain relief against a decree of the orphans' or probate court, on a ground which was available to him as a defense in that court, without showing a sufficient excuse for his failure to make his defense there.
4. *Equitable lien.*—If an administrator grants indulgence to one of the distributees, on a note given for the purchase-money of slaves bought at a sale of the property of the estate, until the statute of limitations has barred a recovery on the note, this gives him no right to come into equity, to establish a lien on the slaves for the unpaid purchase-money.
5. *Contribution by distributee.*—If an administrator voluntarily makes distribution of the assets in his hands, without requiring refunding bonds from the distributees, and without retaining sufficient to pay the outstanding claims against the estate of which he has notice, he cannot afterwards maintain a bill against a distributee for contribution.

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Thomas J. Moore, as the administrator of Hardy H. Moore, deceased, and sought to remove the final settlement of his administration from the probate court, where it had been commenced, into the chancery court. The intestate died in September, 1836, leaving his widow, Mrs. Penelope N. Moore, and their only son, Thomas H. Moore, his sole distributees and heirs-at-law. In 1841 Thomas H. Moore also died, leaving his mother his sole distributee and heir-at-law. Soon after the death of Hardy H. Moore, letters of administration on his estate were granted to said Thomas J. Moore. In 1837, at a public sale and hiring of the slaves belonging to the estate, the widow purchased property and hired negroes amounting to \$2,535, for which she executed her note to the administrator. In December, 1840, the slaves belonging to the estate were divided, by commissioners who had been appointed under an order of the orphans' court, between the widow (who had in the meantime married Napoleon B. Lesueur) and the intestate's only child, Thomas H. Moore. At a partial settlement, made by the administrator in 1846, he charged himself with the amount of the note above mentioned, which, under some agreement with Lesueur and wife, he failed to collect. This note was subsequently the foundation of an action at law, brought by the administrator against Lesueur and wife; but the defendants defeated the suit on the plea of the statute of limitations.—See the report of the case in 18 Ala. 606. These several matters, in connection with alleged mistakes in the settlement of 1846, were made the foundation of the complainant's claim to equitable relief, as will more fully appear from the briefs of counsel and the opinion of the court. The defendants filed a joint answer, denying the material facts on which the equity of the bill was made to rest, and demurring to the bill for want of equity. On final hearing, on pleadings and proof, the chancellor dis-

missed the bill, for want of equity; and his decree is now assigned as error.

I. W. GARROTT, WM. M. BYRD, and LOMAX & PRINCE, for the appellant, made the following points:

1. The proceedings in the probate court, to compel a settlement of the administration, did not deprive the administrator of the right to remove the administration into chancery.—1 Story's Eq. §§ 589, 608; Story's Eq. Pl. § 491; *Cherry v. Belcher*, 5 S. & P. 133.

2. The mistake committed against the administrator by the probate court, in the partial settlement of 1846, can only be remedied in equity. That settlement, under the act of 1843, has the force and effect of a judgment at law, and can only be corrected in a court of chancery. *Duke's Adm'r v. Duke's Distributees*, 26 Ala. Rep. 673; *Thompson v. Hunt*, 22 Ala. 517; *Savage v. Benham*, 11 Ala. 49. That chancery has jurisdiction to overhaul and correct the decrees of the probate court; and that, when its jurisdiction has attached for one purpose, it will go on and close the litigation, see the following cases: *Cowan and Wife v. Jones*, 27 Ala. 317; *English v. Lane*, 1 Porter, 328; *Kennedy v. Kennedy*, 2 Ala. 572; *Stow v. Bozeman's Executors*, 29 Ala. 397; 1 Story's Equity, §§ 111, 150; 2 Hayw. 332; 5 J. J. Mar. 241.

3. The bill shows equity, also, in relation to the note for \$697 given for the hire of negroes by the Linden Railroad Company. When this note was taken, there was no statute requiring an administrator to take security on notes given for the hire of slaves.—Aikin's Digest, 180, § 13. If the administrator, in taking the note without security, acted in good faith, and with ordinary prudence and diligence, he is not chargeable with the loss of the debt.—*Maysville Turnpike Company v. Waters*, 6 Dana, 70.

4. A clear case for equitable relief is shown in the matter of the note for \$2,535, given by Mrs. Lesueur for the hire and purchase of slaves. The administrator failed in the action at law on this note; he is chargeable with the amount of it on his settlement before the probate court;

and thus the distributee gets the property, and yet charges the administrator with the value of it, unless equity will interfere, and either establish a lien on the property, or compel the distributee to allow the note as a credit. This court intimated, in the action at law, that the administrator might have relief in equity.—*Moore v. Lesueur and Wife*, 18 Ala. 606; 9 Porter, 664; *Crayton v. Johnson*, 27 Ala. 503; *Douthitt v. Douthitt*, 1 Ala. 594; 1 Story's Equity, § 184, 257, 527.

5. The bill may be maintained for the purpose of recovering contribution from the distributees.—*Alexander v. Fisher*, 18 Ala. 374; *Jones & Connor v. Jemison*, 4 Ala. 632; *Buford v. Rawling's Ex's*, 5 Dana, 285; 4 Munf. 219; 3 Leigh, 450.

WM. M. BROOKS, *contra*, contended that the bill was wanting in equity, on the following grounds:

1. That the jurisdiction of the probate court, being concurrent with that of the chancery court, and having first attached, could not be divested, unless special equitable circumstances were shown.—*Horton v. Mosely*, 17 Ala. 794; *Gould v. Hays*, 19 Ala. 438; *Pharis v. Leachman*, 20 Ala. R. 662; *Pearson v. Darrington*, 21 Ala. R. 169; 9 Wheaton, 532; 3 Yerger, 167; 5 How. (Miss.) 80; 1 Edw. Ch. 551; 2 Stew. & P. 9.

2. That the mistake in the settlement of 1846 did not give chancery jurisdiction, because, if not now amendable in the probate court, it was a matter which was available to the administrator when the settlement was made, and no reason was shown why he did not then have it corrected. *Evans v. Bolling*, 5 Ala. 551; *Lambkin v. Reese*, 7 Ala. 171; *Beck v. Simmons*, 7 Ala. 71; 2 Porter, 262; *Reynolds v. Dothard*, 7 Ala. 666; *French v. Garner*, 7 Porter, 549; *Mock v. Cundiff*, 6 Porter, 24; *Bibb v. McKinley*, 6 Porter, 636; *Thomas v. Tappan*, 1 Freeman's Ch. 472; 1 Sm. & Mar. 238.

3. That the note for \$2,535, being barred by the statute of limitations at law, could not be made available for any purpose in equity.—5 J. J. Mar. 84.

STONE, J.—The view most favorable to complainant which can be entertained, must concede that, in the absence of special equities, the court of probate and the court of chancery have concurrent jurisdiction of the settlement of administrations. In such case, the tribunal which first takes cognizance of the matter in controversy, will retain it to the exclusion of the other.—*Harrison v. Harrison*, 9 Ala. 479; *King v. Smith*, 15 Ala. 269; *Nelson v. Dunn*, 15 Ala. 514; *Horton v. Mosely*, 17 Ala. 794; *Gould v. Hayes*, 19 Ala. 438; *Smith v. McIver*, 9 Wheat. 532; *Pharis v. Leachman*, 20 Ala. 662; *Pearson v. Darlington*, 21 Ala. 169.

In this case, the probate court had taken cognizance of the final settlement—had made several orders in the cause; and unless it is made to appear that that court can not administer adequate and complete relief between the parties, the bill in this case must be dismissed.

The grounds on which the equity of this bill is rested, are four:

1. The bill avers, and the averment is not denied, that in making a partial settlement of complainant's administration in 1846, the then judge of the orphans' court committed an error in the addition of the credit column of the account-current, by which complainant was injured five hundred dollars, besides interest. Looking into the account-current, we find this averment to be true. The settlement of 1846 was made under the act of 1843, (Clay's Digest, 229, § 42,) which declares that such settlements, and decrees thereon, "have the force and effect of a judgment at common law."

It is here contended that, inasmuch as the said error of \$500 was committed in the said settlement made under the act of 1843, the orphans' court of Marengo, and its successor, the probate court, had no authority to correct that error, because the decree had the force and effect of a judgment at common law.

In *Duke v. Duke*, 26 Ala. 673, this court said: "Without intending to decide that annual or partial settlements may not be inquired into and corrected, as to any and all items which were not litigated when they were made, we

feel quite sure that, when such settlement was made under the act of 1843, and all the parties were duly brought before the court, and an issue respecting the validity of certain items of the account was made and fully tried by the parties before the court, the judgment given upon these items, either allowing or rejecting them, so long as it remains unreversed, must be of force, and as conclusive as if rendered upon the final hearing."—See, also, *Savage v. Benham*, 11 Ala. 49; *Thompson v. Hunt*, 22 Ala. Rep. 517.

We have no disposition to question the correctness of these decisions; but, on the contrary, fully approve of them. The cases of *Savage v. Benham*, and *Thompson v. Hunt*, asserted the simple proposition, that partial settlements, made under and pursuant to the act of 1843, have so far the force and effect of judgments, that they will support a writ of error. The case of *Duke v. Duke* decides, that when "an issue respecting the validity of certain items of the account" is made up and tried, the judgment given upon these items, so long as it remains unreversed, is as conclusive as if rendered on the final hearing. The item of \$500 in this record is not within the letter of the decision in *Duke v. Duke*, because no issue was made up respecting its validity.

We prefer, however, to rest our decision upon another principle. The account-current on which the settlement was had in 1846, though technically not a part of the record which could have been considered on writ of error, (see *Williams v. Gunter*, 28 Ala. 681,) was nevertheless an office paper in the cause, filed of record, and the basis of the decree pronounced. The account was passed upon, audited, and, in many important particulars, re-stated by the orphans' court. It appears, also, to have been certified at the time, by the judge of the orphans' court, as "a true statement of the account of Thomas J. Moore, administrator of the estate of H. H. Moore, deceased, and settled before me [the judge] June term of the orphans' court, Marengo county, 1846."

In the decree rendered is the following language, immediately succeeding the statement of the amount found

in the administrator's hands, and which amount corresponds with the amount shown by the account-current: "It is adjudged, ordered and decreed, that said account, so stated as aforesaid, be allowed and entered of record, as a settlement of said estate, to the present term of the court." The error of \$500 was purely clerical, on which the judicial mind had not pronounced. The orphans' court had in its files in that cause record evidence of the error and its extent, sufficient to justify a correction of that error, *nunc pro tunc*. We do not doubt the power of that court to have made the correction.—Wainwright v. Sanders, 20 Ala. 605; Yonge v. Broxson, 23 Ala. 684; Dickens v. Bush, 23 Ala. 849; Williams v. The State, 29 Ala. 9; State, *ex rel.* v. Mayor, &c., 24 Ala. 701.

Without noticing any other objection to the equity of complainant's bill, as the same is made to rest on the error of calculation, we are satisfied the bill cannot be maintained on this ground.—Chandler v. Faulkner, 5 Ala. 567; Faulkner v. Chandler, 11 Ala. 725; Perrine v. Carlisle, 19 Ala. 686; Minter v. Branch Bank of Mobile, 23 Ala. 762; Long v. Brown, 4 Ala. 662; Williams v. Mitchell, 30 Ala. 299.

2. The fact that the orphans' court charged the complainant with the hire of slaves, which was lost by the insolvency of the Linden rail-road, is the second special equity relied on. If it be true, as contended, (which we do not admit,) that administrators, hiring out the property of their intestates, at the time this was hired out, were not required to take security, the principal being reputed solvent, then this defense was available to the administrator on the settlement in the orphans' court. He offers no excuse why he did not make his defense there. French v. Garner, 7 Porter, 549; Reynolds v. Dothard, 7 Ala. 666; Allman v. Owen, 31 Ala. 167, and authorities cited; Thomas v. Tappan, 1 Freeman's Ch. 472.

3. The third ground relied on relates to the note for \$2,535, given by Mrs. Lesueur for the purchase and hire of slaves. The bill charges, that the administrator indulged the maker of the note, at her request or that of her husband, until it was barred by the statute of limit-

ations. Further, that there was an agreement to allow said note as a payment or set-off on the final settlement of the estate. The answers expressly deny both of those charges; and the evidence is wholly insufficient to overturn these positive denials in the answer. In truth, the same evidence, in substance, was given on the trial at law in the circuit court; and this court held, that it did not remove the bar of the statute of limitations.—See *Moore v. Lesueur*, 18 Ala. 606. This feature of the bill, then, rests on the naked proposition, that the note was given as the purchase-money and hire of slaves; that the promisor enjoyed the benefit of the consideration; and because the cause of action, as a legal liability, is barred by the statute of limitations, chancery is asked, in the absence of any contract for that purpose, to establish a lien on the slaves for the unpaid purchase-money. No authorities have been cited, or found by us, which support this proposition; and hence we hold, that the bill cannot be upheld on this ground.—*Standefer v. McWhorter*, 1 Stew. 532; *Bibb v. McKinley*, 6 Por. 636.

4. We are asked to entertain this bill as one for contribution from Mrs. Lesueur, the distributee; the administrator alleging, he has not in his hands sufficient assets to reimburse himself for payments which he has made as administrator. Intestate died, and the administrator was appointed, in 1836. In 1840, the slaves belonging to the intestate were divided and allotted to Mrs. Lesueur and her infant child, since dead. The bill avers, that said division was made under an order of the orphans' court; but it is not averred at whose instance that order was obtained, or whether with or without the assent of the administrator. The order itself, which is nothing more than the appointment of commissioners, is silent on this question. Neither is it any where averred or shown that the administrator did not have full knowledge of the liabilities of the estate, when the distribution took place. The length of time—four years—which elapsed between the appointment of the administrator and the distribution of the slaves, together with other circumstances shown in the record, prove almost or quite conclusively that he did

know the condition of the estate and its debts, when the division and distribution took place.

The averments of the bill which bear on this question are the following :

“That afterwards, on the 28th December, A. D. 1840, the negro slaves belonging to said estate were divided between the said Penelope N. and Thomas H., as will more fully appear by reference to a copy of the division made under an order of said orphans’ court, herewith filed,” &c.

* * * * *

“That since said partial settlement, your orator has paid off the indebtedness of said estate, which amounted to a larger sum than the moneys he has received of said estate, or the value of the assets which remained in his hands after the division of the negroes aforesaid, as will more fully appear by reference to his account for final settlement of said estate, herewith filed and marked exhibit C, and prayed to be taken as a part of this bill ; and that the balance of said indebtedness your orator has advanced out of his own means ; and that the only property out of which he can be reimbursed the advancement made by him as aforesaid, is that mentioned in exhibit A, being the negroes which were divided between the said Penelope N. and Thomas H., and which went into their possession upon such division ; and which are now in the possession of said Napoleon B., as husband or as trustee aforesaid, and have largely increased in number since said division.”

Exhibit C tends to show, if true, that the administrator, after obtaining a credit for the \$500 and interest, erroneously charged against him, will not have in his hands sufficient funds of the estate to reimburse himself for payments which he claims to have made. Some of those payments are charged to have been made by him wrongfully and by collusion. We will not, in this opinion, undertake to pronounce on this question, because it is not now before us. The question arises, are the above averments sufficient to uphold a claim for contribution ?

In *Alexander v. Fisher*, 18 Ala. 374, intestate had died

in December, and the property was consentively distributed in January following. Subsequently a judgment for some \$13,000 was recovered against the administrator, on notes which, it was alleged, intestate had signed as the surety of another. Administrator had interposed the plea of *non est factum* to these notes, but a recovery was had on the testimony of the principal maker of the notes. The administrator had not in his hands sufficient assets to reimburse himself for the payment of this judgment, and this bill was filed against the widow to compel contribution; the other distributees having severally paid their proportion. The claim was resisted, on the ground that the administrator had voluntarily distributed the property, without requiring refunding bonds from the distributees; and on the further ground, that the administrator, before making distribution, had notice of the claim on which a recovery was afterwards had against him. This court granted him relief.

On the first ground, this court, after alluding to the fact of the early division, and the advantages accruing therefrom to the distributees, added, "The administrator has acted in good faith. There has been on his part no fraud or collusion; but, if he has been at all in fault, his error consisted in not requiring refunding bonds before making distribution; but even this may find some apology in the liberal confidence, which may have presumed to have obtained between members of the same family, with respect to their common property, and the charges and burdens to which it was subject." In another place, the court, after characterizing the rule in cases like this as *harsh and stringent*, had said, the administrator was "influenced by a desire to aid the distributees; and, without any motive personal to himself, had divided the property, without a *full knowledge* of the condition of the estate with respect to the debts due from it."

On the question of notice, this court said, "We grant, the evidence shows he [the administrator] had some notice of the existence of the notes due to the branch bank and others, for which the intestate's estate, it seems, has been made liable by suit; but we think it very clear, that he

was not fully advised upon that subject. He was acquainted with the peculiarities of his father, his caution, his repugnance to going in debt, his inability to write his name; whereas the notes, for the payment of which the estate has been charged, were for near ten thousand dollars, and purported to be signed by him as security for one who was notoriously insolvent. Besides, they appear to have been signed by one who could write, and the administrator knew that his intestate signed by making his mark. All these facts taken together, we think, will satisfy any reasonable mind, that the administrator did not believe that these were the notes of his intestate, and that the circumstances fully warranted his incredulity."

True, our predecessors, in the case of *Alexander v. Fisher*, quoted without dissent certain expressions which are found in the Virginia cases of *Bonner v. Glendenning*, 4 Munf. 219, and *Gallega v. Attorney-General*, 3 Leigh, 450; which expressions tend to rest the administrator's right to recover contribution on the absence of fraud and collusion. What was quoted, however, from the two Virginia cases, was not necessary to a decision of the questions which this court was considering; and even the court of appeals of Virginia do not feel themselves bound by those principles.

In the case of *Davis v. Newman*, 2 Robinson's Virginia Rep. 664, the court reviewed the cases cited above, and other decisions of that court. This case was decided in 1844, long after the decisions quoted from 4 Munford and 3 Leigh. The court said, "But, as between the executor and the legatee who has been paid, the cases are decisive that he shall not recover back the payment, if voluntarily made."

The case in 2 Robinson was, in many of its features, very like the one we are considering. Still it was ruled that the executor could not recover.

Our own court, in the case of *Alexander v. Fisher*, "conceded, as a general rule, that if an executor or administrator, with a *knowledge* of the existence of demands against the estate, pay out legacies, or make distribution of the assets, he cannot recover back from the legatees or

the distributees, to whom he has thus turned over the effects, anything for his own indemnity, unless he has obtained from them refunding bonds. If, with such knowledge, he submits to pay legacies, or distribute the property, the persons receiving the same have the right to regard it and treat it as their own. It is given to them absolutely, and closes the transaction between them and the administrator."

In thus laying down the doctrine, our court but affirmed the general rule of law upon the subject; the rule which has prevailed, *as a general rule*, for more than one hundred years.—See *Edwards v. Freeman*, 2 Pr. Williams, 435, 447. Mr. Story, in his commentaries on Equity Jurisprudence, (§ 90,) says: "In the course of administration of estates, executors and administrators often pay debts and legacies upon the entire confidence, that the assets are sufficient for all purposes. It may turn out, from unexpected occurrences, or from debts and claims made known at a subsequent time, that there is a deficiency of assets. Under such circumstances, they may be entitled to no relief at law. But in a court of equity, if they have acted with good faith, and with due caution, they will be clearly entitled to it, upon the ground, that otherwise they will be innocently subject to an unjust loss, from what the law itself deems an accident."—See, also, 2 Lomax on Executors, 296-7-8, and notes to the two authors.

It is obvious, then, that under this rule, to entitle the representative to be reimbursed, the payment must be made in the *confidence* that the assets will be sufficient for all purposes; and that the deficiency is shown by *unexpected occurrences*, or by debts and claims made known *at a subsequent time*. In the case of *Alexander v. Fisher*, *supra*, this court held that, under the circumstances then disclosed, the administrator had brought himself within the influence of the exceptional rule, and that consequently he was entitled to recover.

In the present case, it is not even averred, that when the slaves were distributed, the administrator was ignorant of his intestate's liabilities, or the extent of them;

that he believed the assets retained by him would be sufficient to meet the debts; or, that any unexpected occurrences, or debts subsequently made known, have shed any new light on the condition of the estate. The claim to relief rests on the naked averment, "that since said partial settlement, your orator has paid off the indebtedness of said estate, which amounted to a larger sum than the moneys he has received of said estate, or the value of the assets which remained in his hands after the division of the negroes aforesaid." The proof, as we have said above, not only fails to show confidence disappointed, but tends strongly to convince us that the administrator, when the slaves were divided, *knew* of the liabilities of the estate. Under such circumstances, he can claim no relief on this feature of the bill.

The decree of the chancellor is affirmed.

WILSON vs. CAMPBELL.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Admissibility of execution as evidence for purchaser at sheriff's sale.*—In ejectment against a purchaser at sheriff's sale, the execution under which the sale was made, being regular on its face, is admissible evidence for him, although its validity is controverted on the ground that the plaintiff therein was dead when it was issued.
2. *Admissibility of record as evidence.*—In an action against a purchaser of land at sheriff's sale, brought by one who was neither a party nor a privy to either one of the executions under which the sale was made, the record of a motion against the sheriff, by the plaintiff in one of the executions, to have the proceeds of the sale paid over to him, on the ground that the plaintiff in the other execution was dead before the issue of his execution, is not admissible evidence against the defendant, to prove the fact that said plaintiff in execution was dead before the issue of his execution.
3. *Admissibility of sheriff's deed as evidence.*—The admissibility of a sheriff's deed, as evidence for the purchaser at execution sale, is not affected by a variance between the judgment and execution under which the sale was made, and the recitals thereof in the deed.

4. *Motion to suppress deposition on account of defective execution of commission.*—A deposition will be suppressed on motion, when it appears from the certificate of the commissioner that the witness died before signing it; the commissioner testifying, also, that the witness took the interrogatories away with him, and returned the answers to him already written out, but never subscribed or verified them by oath.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by L. J. Wilson, against Archibald Campbell, to recover certain lands which were described in the complaint as follows: "The south-east quarter of section seven, township eleven, range one east, containing one hundred and sixty 61-100 acres; the south-west quarter of section eight, same township and range, containing one hundred and sixty 92-100 acres; the north-east quarter of section eight, same township and range, containing one hundred and sixty 92-100 acres; the south-west quarter of the south-east quarter of section eight, same township and range, containing forty 23-100 acres; the west half of the north-west quarter of section seventeen, same township and range, containing eighty acres; and the east half of the north-west quarter of section eight, same township and range, containing eighty acres." The plaintiff claimed the lands under a deed of trust, dated the 22d February, 1845, which was executed by Henry A. Skinner, to John Howze as trustee, for the benefit of Harris, Clayton & Co. as beneficiaries, "and transferred shortly thereafter, for value paid, to one L. M. Wilson;" and his purchase under the deed, at a sale made by the trustee on the 24th September, 1845. The defendant derived title under a purchase at sheriff's sale, made on the 2d August, 1852, under two executions against said Henry A. Skinner, one in favor of the Branch Bank at Mobile, and the other in favor of one J. B. Skinner; and he also attacked the validity of the deed under which the plaintiff claimed.

The judgment in favor of the Branch Bank at Mobile against Henry A. Skinner was rendered on the 2d December, 1845, and was for \$3,484 30. On this judgment six executions were issued, under the last of which, issued on

the 18th June, 1852, the levy and sale were made. In the sheriff's endorsement on this last execution the land levied on is thus described: "The south-east quarter of section seven, township eleven, range one east, containing one hundred and sixty acres; the north-east quarter of section eight, same township and range, one hundred and sixty acres; the south-west quarter of section eight, same township and range, one hundred and sixty acres; south-west quarter of south-east quarter of section eight, same township and range, forty acres; the west half of the north-west quarter of section eight, same township and range, eighty acres; and the west half of the north-west quarter of section seventeen, same township and range, eighty acres;" and the endorsement states, that "six hundred acres of the above land was sold to A. Campbell." The judgment in favor of Joseph B. Skinner, which was for \$1,452 50, was rendered by confession on the 27th October, 1845. On this judgment three executions were issued, under the last of which, issued on the 3d May, 1852, the sheriff levied on the same lands, describing them in his endorsement thereon as on the execution in favor of the Branch Bank. When the defendant offered in evidence the execution in favor of Joseph B. Skinner, the plaintiff objected to its admission, "on the ground that it was null and void on account of the death of said J. B. Skinner at the time it was issued;" and, in support of his objection, read in evidence to the court the record of the proceedings had in the court from which said executions issued, on a motion by one Jones Fuller, as the assignee of the bank judgment, to have the proceeds of the sale of lands paid over to him, on the ground that the execution in favor of J. B. Skinner was void, because the plaintiff therein was dead at the time it was issued; which motion was granted by the court on that ground. The defendant objected to the admissibility of this record, and the court sustained his objection; to which the plaintiff excepted. The court then overruled the plaintiff's objection to said execution, and allowed the execution to be read to the jury; to which also the plaintiff reserved an exception.

The sheriff's deed to the defendant described the judgments and executions, under which the land was sold, as follows: "Whereas, by virtue of two executions, issued out of the circuit court of Clarke and Mobile counties, to me directed and delivered, tested the 3d May and 18th June, 1852, I was commanded to take of the goods and chattels of Henry A. Skinner the sum of \$5,304 50, which the Branch of the Bank of the State of Alabama at Mobile and J. B. Skinner have recovered against him in the said courts," &c. The land was thus described in said deed: "The north-east quarter of section seven, township eleven, range one east, containing one hundred and sixty acres; the north-east quarter of section eight, same township and range, containing one hundred and sixty acres; the south-west quarter of section eight, same township and range, containing one hundred and sixty acres; the south-west [*quarter*] of the south-east quarter of section eight, same township and range, containing forty acres; and the east half of the north-west quarter of section eight, same township and range, containing eighty acres—making six hundred acres." The plaintiff objected to the admission of this deed, "because it did not set out any such judgments or executions as those offered in evidence." The court overruled the objection, and the plaintiff excepted.

The plaintiff sought to impeach the defendant's title under the bank judgment and execution, by showing that one George W. Barney, who was a joint maker (with Henry A. Skinner) of the note on which said judgment was founded, "had paid and satisfied said judgment before the levy and sale under said execution;" and that said Barney was the real defendant in the suit, Campbell being merely his tenant and agent. For the purpose of rebutting the defendant's proof of fraud in the deed under which he claimed, the plaintiff offered to read in evidence the deposition of said Henry A. Skinner, taken by R. F. Butt as commissioner. The final certificate, appended to said deposition by the commissioner, was in these words: "And I, R. F. Butt, commissioner as aforesaid, do further certify, that I have personal knowledge of the

identity of the witness; that his aforesaid evidence and answers, under oath, were taken down and reduced to writing, and examined by the witness, and by him approved; that the said testimony, as specified in the caption, the day the same bears date, (?) in conformity with the laws of Alabama; and that the witness' name is not subscribed to the deposition, because he was taken sick and died of yellow fever before I could prepare the document." The defendant objected to the admission of this deposition, and, in support of his objection, read to the court the deposition of R. F. Butt, the commissioner by whom said Skinner's deposition was taken, who testified, substantially, that he allowed Skinner to take the interrogatories home with him, on his representation "that he desired to be very particular about the matter, and that it would be necessary for him to refer to some old papers in his possession;" that Skinner afterwards returned the interrogatories to him, with his answers thereto, written out, as he said, by himself; that he then requested Skinner to call the next day, in order that he might sign and swear to the answers after they had been copied; and that he never saw Skinner again. The court excluded the deposition of Skinner, and the plaintiff excepted.

All the rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

E. S. DARGAN, with whom was JNO. T. TAYLOR, for the appellant.

F. S. BLOUNT, *contra*.

RICE, C. J.—The execution in favor of Joseph B. Skinner against Henry A. Skinner was offered by the defendant in this action, in connection with other evidence, to show title in himself to the land in controversy. It was not void on its face. Conceding that its weight and effect would have been destroyed by proof of the fact, that the plaintiff therein (the said Joseph B. Skinner) died before it issued; yet, as that fact was not admitted, but was contested, its determination, in this action, belonged not to the court, but to the jury. As the execu-

tion was, *prima facie*, valid and admissible, and its invalidity depended upon a question of fact, which the jury alone, in this case, were competent to determine, the court properly admitted it in evidence; that being the only course which would secure to the defendant the benefit to which he was entitled from the execution, in the event the jury determined the aforesaid question of fact in his favor.—Driver v. Spence, 1 Ala. 540.

[2.] The record of the motion made by Jones Fuller, assignee of the Branch Bank at Mobile, and of the action of the court thereon, was offered as evidence *against the defendant in the present action, of the fact that Joseph B. Skinner died before the issue of the aforementioned execution.* It is certain that the plaintiff in this action was neither a party nor privy to that motion; and that if the decision upon that motion had gone the other way, it could not have been used by the present defendant against him, as *evidence of the fact* of the death of the said Joseph B. Skinner before the execution issued. It is a rule, that a record is not *evidence of the facts* recited, except between the parties to it, or privies; nor in favor of one who was neither party nor privy, and against whom it could not have been evidence of the facts recited.—Blann v. Chambliss, 9 Porter, 412; Plant & Co. v. Harris, at the last term; Atwood v. Wright, 29 Ala. R. 346, and authorities there cited.

[3.] The variance between the judgments and executions under which the sheriff sold the land, and the recitals of those judgments and executions in his deed, did not render his deed inadmissible.—Driver v. Spence, *supra*.

[4.] There was no error in rejecting the instrument offered as the deposition of H. A. Skinner, under the notice and agreement that the motion to that effect might be heard at any time during the trial. To entitle a party to the introduction of a deposition at law, when its admissibility is properly objected to, it must appear that the requisitions of the statute in relation to the taking of depositions have been substantially complied with. That does not appear in this instance, when the

testimony of the commissioner is noticed.—Code, § 2322; Ulmer v. Anstill, 9 Porter, 157; Henderson v. Givens, 16 Ala. R. 261.

Judgment affirmed.

RABBY & CO. vs. O'GRADY.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Liability as partner on note executed in partnership name.*—In an action against several persons, as partners, on a promissory note executed by the partnership, if one of the defendants pleads *non est factum*, it is incumbent on the plaintiff to prove that such defendant himself executed the note, or that he was a member of the firm when it was executed, or that he had been a member of the firm, and that the plaintiff, having had previous dealings with it, had not been notified of his withdrawal at the time when the note was given.
2. *Competency of defendant as witness for co-defendant.*—Under section 2288 of the Code, a defendant against whom there is no evidence is a competent witness for a co-defendant.
3. *Admissibility of partnership accounts against third persons as affecting liability of person as partner.*—In an action against several persons, as partners, on a promissory note executed in the name of the partnership, accounts contracted by third persons with the partnership, under its different firm names, are not, *prima facie*, competent evidence against one of the defendants, who pleads *non est factum* and the general issue.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Dominick O'Grady, against Zephaniah Rabby, Jacob Rabby, Edward A. Lewis, William Morgan, and George J. McCluskey, described in the complaint as being "formerly partners, using the name of Z. Rabby & Co.;" and was founded on a promissory note for \$340 40, executed in the name of Z. Rabby & Co., dated November 26th, 1855, and payable thirty-four days after date, to the plaintiff's order, at the Bank of Mobile. The action was discontinued as to William Morgan, on whom process was not served. No defense was

made by Zepheniah and Jacob Rabby; but the other two defendants, Lewis and McCluskey, separately pleaded the general issue and *non est factum*, each denying that he was or had been a partner in the firm of Z. Rabby & Co.

"On the trial," as the bill of exceptions states, "the plaintiff offered in evidence the note of Z. Rabby & Co., and proved, that said firm had a little country-store, about four miles from the city of Mobile, and traded with people from the country coming to and from the city; that a firm by the name of E. A. Lewis & Co., composed of E. A. Lewis, Geo. J. McCluskey, William Morgan, and Z. Rabby, went into business on the 17th January, 1854; that McCluskey sold out his interest therein to Jacob Rabby, a brother of Zephaniah, on the 30th May, 1854; that Lewis sold out his interest to Z. and J. Rabby, but at what time was not clearly shown, the evidence on the point being conflicting; that the firm of Z. Rabby & Co. succeeded that of E. A. Lewis & Co.; that Z. Rabby sold out his interest to Henry Rabby in September, 1855; and that no publication appeared in any newspaper, either when said firm of E. A. Lewis & Co. went into existence, or when it dissolved, or when the firm of Z. Rabby & Co. went into existence, or that of H. & J. Rabby. It was in evidence, that the account on the plaintiff's books against E. A. Lewis & Co. had not been finally settled when the concern changed to Z. Rabby & Co., although payments had been made from time to time; that the said charge on plaintiff's books was made about five months before the note sued on was given by Z. Rabby, in the name of Z. Rabby & Co.; and that neither Henry nor Pierre Rabby, who also purchased an interest, ever made any contract or settlement with McCluskey or Lewis when they purchased or had an interest. Jacob Rabby, one of the defendants, was introduced as a witness by the plaintiff, and testified, that McCluskey sold out to him on the 30th May, 1854; that he considered that Lewis had an interest in the firm of Z. Rabby & Co., and, according to his understanding, Lewis sold out to him and Z. Rabby when he made a deed for the land on which the store stood, which was on the 31st January,

1856; and that neither he nor Z. Rabby, who were in the concern of Z. Rabby & Co., ever made any settlement with said Lewis for the profits or losses of said firm. The counsel for Lewis then proposed to introduce said McCluskey as a witness, for the purpose of showing that he (McCluskey) gave notice to the plaintiff, in February, or early part of the spring, 1855, that the firm of E. A. Lewis & Co. was dissolved, and that Lewis was not a member of the firm of Z. Rabby & Co.; which was refused by the court, and said Lewis excepted.

"The counsel of Lewis and McCluskey proposed to introduce the accounts made out by E. A. Lewis & Co., Z. Rabby & Co., and subsequently H. & J. M. Rabby, against the said Lewis and several other persons in the immediate neighborhood of the store, for articles purchased at the store, as made out and receipted by the said Z. and J. Rabby, and to ask the witness Jacob Rabby about them while he was on the stand; but the court refused to allow them to go before the jury, and said Lewis and McCluskey excepted to its decision."

These two rulings of the court, with other matters, are now assigned as error.

CONWAY, for the appellant.

HALL, *contra*.

WALKER, J.—Section 2288 of the Code says, that a defendant, against whom there is no testimony, is a competent witness for a co-defendant. This was a suit on a note executed by Z. Rabby & Co. The defendant McCluskey, who was offered as a witness for a co-defendant, pleaded *non est factum*. In order to render him liable upon the note, he must have executed the note, or been one of the members of the firm when it was given; or he must have been previously a member of the firm which executed it, and it must have been given without notice of the cessation of his membership, to one who had had dealings with the partnership during his membership. Story on Part. 247, § 160. After the plea of *non est factum*, it was incumbent upon the plaintiff to show one or

the other of the facts requisite to prove the liability. There was not the slightest evidence conducing to show, either that McCluskey executed the note, or that he was a member of the firm of Z. Rabby & Co., in the name of which the note was given, at the date of the note, or that he ever had been a member of it. There was, therefore, in this suit upon the note, no evidence against McCluskey, who was offered as a witness, and the court erred in refusing to permit him to testify.

[3.] The defendant offered in evidence sundry accounts of the different partnerships, in the different names; against persons other than the plaintiff. We do not perceive how those accounts could contribute to illustrate any question involved in the case, and the defendant does not appear to have made their pertinency apparent to the court below. They were not, *prima facie*, admissible; and if they could be made competent by the aid of other testimony, it was incumbent upon the defendant to have offered them in connection with such evidence.

The judgment of the court below is reversed, and the cause remanded.

HARRISON'S ADM'R vs. JONES' ADM'R.

[ACTION ON JUDGMENT—PLEA OF STATUTE OF NON-CLAIM.]

1. *Proof of presentation of claim.*—Where it appears that an execution against an administrator, on a judgment recovered against his intestate in his lifetime, was placed in the hands of the sheriff, and that the administrator, on seeing the execution, applied to the creditor for indulgence, which was granted to him,—this is sufficient proof of a presentation of the demand to avoid a plea of the statute of non-claim.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Rebecca Jones, as the administratrix of William C. Jones, deceased, against William E. Boyd, as the administrator *de bonis non* of Reuben Harrison, deceased, and was founded on a judgment recovered by said William C. Jones, in the city court of Mobile, on the 29th March, 1854, against said Reuben Harrison and others. No pleas appear in the record, but the defense appears to have been rested on the statute of non-claim. It appeared from the evidence adduced on the trial, that the defendant's intestate died on the 29th May, 1854; that James D. Craig was appointed his administrator on the 28th June, 1854; that an execution was issued on said judgment a few days after Craig's appointment, and was placed in the hands of the sheriff of Dallas county; that this execution was shown by the sheriff to Craig, either on the application of the latter to see it, or on a demand of payment by the sheriff; and that Craig then objected to the regularity of the execution, because it purported to be an *alias*, instead of an original *fi. fa.*, and wrote a letter to the plaintiff's attorney of record, asking indulgence. That portion of Craig's letter, which relates to the question of indulgence, was in these words: "I am the administrator of Harrison, and am desirous of saving costs and trouble. I therefore propose, if you will suspend until the cotton crop is gathered, (say until 1st January next,) I will pay it without further trouble; else I shall be compelled to supersede. The estate, I have no doubt, is amply solvent; and my intention is, with the crop on hand, to sell property enough at the end of the year to pay all the debts; but, if I suffer the negroes [to be] levied on and sold, I will not be able to gather the crop." It appeared that the plaintiff's attorney answered this letter, accepting the proposition for indulgence; but it was not shown that the administrator received the answer. The defendant was appointed administrator in February, 1855, Craig having previously resigned; and this suit was instituted in October, 1856.

"The court charged the jury on this evidence, that if they found from the evidence that the defendant's intest-

ate died on the 29th May, 1854; that letters of administration on his estate were issued to Craig on the 28th June, 1854; that an execution issued on the judgment a few days afterwards, and was placed in the hands of the sheriff of Dallas; that said sheriff applied to Craig for payment thereof, or Craig applied to the sheriff, and saw the execution, and in that way learned the nature and amount of the claim now sued on; and that Craig, as such administrator, immediately afterwards wrote the letter now in evidence to the plaintiff's attorney; and that said attorney replied, accepting the proposition contained in said letter; and that Craig, while still administrator of said estate, received the reply of plaintiff's attorney,—then this suit is not barred by the statute of non-claim."

This charge, to which the defendant excepted, is the only matter assigned as error.

D. S. TROY, for the appellant.

GEO. W. GAYLE, *contra*.

STONE, J.—The agreement to forbear in this case, made between plaintiff's attorney and the administrator in chief, is, perhaps, a sufficient consideration to uphold the promise made by Mr. Craig to pay the demand 1st January, 1855, and would probably bind him personally. It is not, however, necessary to settle this question absolutely. We think the evidence, if believed, established presentation; and the credibility of the testimony was fairly submitted to the jury.—Code, § 1883; Pollard v. Scears, 28 Ala. 484.

Judgment affirmed.

FAWCETTS vs. KIMMEY.

[BILL IN EQUITY BY SURETY FOR FORECLOSURE OF MORTGAGE TO CREDITOR.]

1. *Surety's right of subrogation.*—A surety, having paid off the debt, is entitled to stand in the place of the creditor, and to have a mortgage foreclosed, which was given by his co-surety, at whose request he became bound, as well for the security of the debt, as for his indemnity against liability.
2. *Cancellation of deed.*—The mere cancellation of a deed does not divest the title of the grantee, nor does it enable the grantor, by a subsequent conveyance, to pass the title to one who is not shown to be a *bona-fide* purchaser or incumbrancer without notice of the canceled deed.
3. *Conflicting liens of mortgage and judgment.*—The lien of a judgment on land is superior to that of a mortgage executed by the debtor after the rendition of the judgment; and a purchaser at sheriff's sale under the judgment consequently acquires a title superior to that of any one holding under the mortgage.
4. *Equitable title not subject to levy and sale at law.*—Under the law existing in this State prior to the adoption of the Code, the equitable title of a purchaser of land, who had paid the purchase-money, but had not received a conveyance, could not be sold under execution at law against him.

APPEAL from the Chancery Court at Troy.

Heard before the Hon. WADE KEYES.

THIS bill was filed by David P. Fawcetts, against Seaborn C. Kimmey, M. C. Kimmey, John Lindsey, Alfred Holley and others. Its material allegations were, that the complainant, on the 6th January, 1850, at the solicitation and request of Seaborn C. Kimmey, became jointly bound with said Seaborn as surety of John M. Kimmey, on several promissory notes due and payable to John Lindsey, which amounted in the aggregate to nearly \$1,000; that Seaborn Kimmey, on the same day, executed a mortgage to said Lindsey on a tract of land of which he was then seized and possessed, as well to secure the payment of said notes, as to indemnify complainant against loss by reason of his said suretyship; that this mortgage was duly recorded; that Lindsey afterwards recovered judgments on said promissory notes, as they severally fell due; that complainant was compelled, in

consequence of the insolvency of said Seaborn and John M. Kimmey, to pay off and satisfy these judgments; and that Lindsey had "given up" to him the said mortgage. The prayer of the bill was, that the complainant might be subrogated to all the rights which Lindsey had under said mortgage, and for general relief.

Alfred Holley, who was made a defendant on an allegation that he claimed an interest in said lands, filed an answer to the bill; setting up title to the lands embraced in the mortgage, under a purchase made by him at sheriff's sale, on the 1st Monday in February, 1851, under an execution against John M. Kimmey, issued on a judgment recovered against him by the Branch Bank at Montgomery; and alleging that Seaborn Kimmey, at the time said mortgage was given, had no title to the lands thereby conveyed, but that the title thereto was in John M. Kimmey. The facts connected with the title to said land, as alleged in Holley's answer, are stated in the opinion of the court, and, therefore, need not be here detailed.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, and his decree is now assigned as error.

PUGH & BULLOCK, for the appellant.

C. CUNNINGHAM, *contra*.

RICE, C. J.—From the pleadings and proof it appears, among other things, that at the request of S. C. Kimmey, and upon the faith of the mortgage of the lands in controversy executed by him on the 6th day of July, 1850, the complainant became co-surety with him, for John M. Kimmey, on the notes mentioned in the bill and in the mortgage; that the mortgage was executed as well to save complainant from loss, as to secure the payment of said notes to the payee, Lindsey; that the said S. C. and John M. Kimmey are insolvent; and that the complainant, under legal coercion, has paid off the debt evidenced by said notes. If these were the only facts appearing in the pleadings and proof, the complainant would upon them be entitled to a decree for the sale of the lands, and an application of the proceeds of the sale to his reimburse-

ment in the premises, upon the principle that the surety, who has paid the debt of the principal, is entitled to stand in the place of the creditor, as to all securities for the debt held or acquired by the creditor, and to have the same benefit from them as the creditor might have had.—Cullum v. Emanuel, 1 Ala. 23; Brown v. Lang, 4 Ala. 50.

But this right of the complainant, which is founded on the mortgage of the lands executed by S. C. Kimmey on the 6th day of July, 1850, is opposed by a defense founded on a sale of the same lands by the sheriff made in February, 1851, under a judgment obtained by the Branch Bank at Montgomery, in the circuit court of Montgomery, against John M. Kimmey and others, on the 19th November, 1844.

To determine the effect of this defense, it is necessary to ascertain the origin and nature of the title of S. C. Kimmey and of John M. Kimmey to the lands. It seems to be clear that, up to the 7th day of December, 1849, neither of them had ever had any title, either legal or equitable, to the lands; that up to that day the *legal* title was in L. W. Carroll and S. Reid; and that on that day, the said L. W. Carroll and his wife executed a deed, conveying to John M. Kimmey the lands, which deed, on proof of its execution by the subscribing witness, was recorded in the proper office on the 29th July, 1850. A copy of that deed, of the proof of its execution by the subscribing witness, and of the date and fact of its being recorded, is set forth as "exhibit A" to the answer of the respondent Holley to the original bill; and the execution of this and all the other exhibits to the bill and answers, as well as the due record of all the deeds and mortgages as shown by the exhibits, is broadly admitted in the written agreement of the solicitors of the complainant and respondents contained in the record. It further appears, that up to the 18th day of June, 1850, S. C. Kimmey never had any title or evidence of title to said lands; that on that day, a deed was executed by L. W. Carroll and his wife, and by S. Reid and his wife, conveying the said lands to him; and that this conveyance to him was made, not in

consideration of any contract or payment made by him, but in consideration of the contract and payment made by his father, John M. Kimmey—the same contract under which the prior deed had been executed to John M. Kimmey by L. W. Carroll and his wife.

Something is said in the record as to the cancellation of this prior deed—the deed to John Kimmey. But the complainant does not, in his bill, or otherwise, make it appear that either he or the mortgagee, Lindsey, is a *bona-fide* purchaser or incumbrancer without notice of that deed, the execution of which stands admitted by his solicitor upon the record. And therefore we need not decide, whether the alleged cancellation of that deed is proved or not; for, conceding it to be canceled as alleged, its mere cancellation did not divest the title which had passed by the deed, nor revest it in the grantor, nor enable the grantor, by a subsequent deed, to pass that title to one who does not place himself in a better position than that in which the record places the complainant. *Mallory v. Stodder*, 6 Ala. 801, and authorities there cited; *Doe, ex dem. Nickles v. Haskins*, 15 Ala. 619.

The deed of L. W. Carroll and wife to John M. Kimmey vested in him *the legal title* which the said L. W. Carroll then had to the lands—that is, *the legal title to an undivided half interest in the lands*, leaving the legal title to the other undivided half in S. Reid. Upon the execution of that deed, the legal title to the undivided half which passed thereby to John M. Kimmey, became subject to the payment of the aforesaid judgment of the Branch Bank against him and others; and this legal title of his to the undivided half passed to the purchaser at the sale made by the sheriff under that judgment.—*Clay's Digest*, 205, § 17; *Doe, ex dem. Nickles v. Haskins*, 15 Ala. 619; *Forrest v. Camp*, 16 Ala. 642. The lien of that judgment, being older than the mortgage executed by S. C. Kimmey, and older than any title or claim on his part to the lands, must prevail over the mortgage, as to the undivided half which passed to John M. Kimmey by the deed of L. W. Carroll and wife; and the purchaser at the sheriff's sale is entitled to the benefit of that priority.—See cases *supra*,

and Daniel v. Sorrells, 13 Ala. 436; Crutchfield v. Hudson, 23 Ala. 303.

But the mere *equitable* title of John M. Kimmey, to any part of the lands, could not, in 1851, and before the Code went into effect, be sold under execution from a court of law.—Doe, *ex dem.* Davis v. McKinney, 5 Ala. 719; Pauling v. Barron, Meade & Co., 32 Ala. 9. It is clear, therefore, that the defense founded on the sheriff's sale extends only to *the legal title which he had to the undivided half of the lands*. And we see nothing in the record which bars the complainant of the right to have a decree for the sale of the other undivided half, and the application of the proceeds of the sale thereof to his reimbursement.

Decree reversed, and cause remanded.

JOHNSON'S ADM'R vs. SELLERS' ADM'R.

[ACTION FOR BREACH OF SPECIAL CONTRACT.]

1. *Construction of contract as to intention of parties.*—A party is not bound to perform an act which is not within the stipulations of the contract, merely because the other party expected and understood that he would perform it, and he knew that fact.
2. *Sufficiency of consideration.*—A promise by defendant to plaintiff, made to induce the latter to comply with an existing contract between him and other persons, is without consideration.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Lucius B. Johnson, (and afterwards revived in the name of his administrator,) against the administratrix of Calvin C. Sellers, deceased; and was founded on a verbal contract, which is thus described in the complaint: "In consideration that plaintiff and his wife would discontinue teaching school in the Dallas Academy at Selma, and leave and abandon all their inter-

est in said academy, and in the lot on which it was located, and all their then existing engagements in reference to teaching at that place, and would take charge as principals and teach in the Wilcox Female Institute at Camden, the defendant's testator then and there contracted and agreed to pay plaintiff the sum of twenty-five hundred dollars." The defendant pleaded, "in short by consent, the general issue, non-claim, failure of consideration, fraud, accord and satisfaction, and open account with statute of limitations of three years."

"On the trial," as the bill of exceptions states, "there was evidence tending to show that, on the 5th August, 1850, the trustees of the Camden Female Institute, in Wilcox county, Alabama, held a meeting, and elected L. B. Johnson and his wife principals of said institute. This fact was shown by the production of the official record of the proceedings of said trustees, which was shown to have been regularly kept by said trustees as a record of all their official proceedings, and which was put in evidence." This record contained the following resolutions and other statements, in relation to the appointment of said Johnson:

August 5, 1850. "*Resolved* by the board of trustees, that we elect L. B. Johnson and lady principals of the Wilcox Female Institute for the next scholastic year, commencing on the 15th September, 1850, and ending July 15th, 1851; *provided*, he secures to be paid at the end of the said scholastic year the sum of \$700 for the rent of the institute building, (lot, steward's house, out-houses, and all,) to be paid to the said trustees. *Resolved*, further, that C. C. Sellers be appointed to communicate to Mr. Johnson and lady their appointment, and to solicit their acceptance, and to report to the next meeting of the board."

August 12, 1850. "The committee appointed to inform L. B. Johnson and his lady of their election as principals of the Wilcox Female Institute, reported progress, and asked for further time to complete his report; which was granted."

August 17, 1850. "Col. Sellers[reported] L. B. John-

son, the elected principal of the institute, as being in town; whereupon Mr. Johnson was invited to come before the board. When Mr. Johnson appeared, Judge Bridges introduced the following resolution: '*Resolved*, that, under the circumstances which surround us, this board agrees to let to the principal elect, L. B. Johnson, the use, occupation, &c., of the buildings, out-houses, &c., of the Wilcox Female Institute, during the coming scholastic year, free of rent, upon the express conditions, that he procure the requisite number of competent teachers, and furnish the same with suitable musical instruments, apparatus, globes, &c.; and that the rates of tuition are not to be above the rates of the Dallas Academy, as heretofore fixed, to be regulated by the trustees; the board at the institute not to be above the rates heretofore established, to be regulated also by the trustees.' Said resolution was adopted; upon which, Mr. Johnson accepted the election of principal of said institute."

"There was evidence tending to show, that a letter was written by Sellers to Johnson, shortly after the meeting on the 5th August, 1850, notifying him of the election of himself and his wife as principals of said institute at Camden; that Johnson then lived in Selma, and was there teaching school, at the Dallas Academy; but there was no proof that this letter ever reached Johnson. Soon afterwards, a man was sent from Camden to Selma for Johnson, and Johnson returned with him. On Johnson's arrival in Camden, a meeting of the trustees was called on the 17th August, 1850, as shown by the proceedings of the board. The defendant offered evidence tending to show, that the previous order of the trustees, electing Johnson and his wife as principals, was communicated to Johnson at said meeting; and that Johnson made a considerable speech in relation to the school, the favorable position of Camden, and the high qualities of his wife as a teacher, and spoke of her popularity as a teacher. There was, also, evidence tending to show that Johnson left Camden shortly afterwards, and did not return until some time in October, though it had been agreed that the school should commence about the middle of September;

that he came alone on his return, and did not bring his wife with him; that when this was objected to, he said that he did not understand that the contract bound him to bring her; that an interview took place soon afterwards between Johnson, Sellers, and others of the trustees, but it was not a meeting of the board of trustees; that a dispute arose between them at this interview, about Johnson's not having brought his wife,—he contending that he did not consider himself bound by the contract to bring her with him, and Sellers and the other trustees contending that he was bound to bring her, and that he had agreed to do so; that Johnson stated at this interview, that he had spent \$5,000 in making improvements on the Dallas Academy, and had an interest in the building to that extent so long as he continued the school there—that he had been advised by his lawyer, that he would forfeit this right if he voluntarily abandoned the school there; and that he had offered to sell his interest in the academy to the trustees for \$2,500, but they refused to give it; and that his wife was then teaching school there under a contract for \$1,650 *per annum*. The evidence also tended to show, that Sellers then asked Johnson, 'Will you take \$2,500 from us, and bring Mrs. Johnson with you to take charge of the school at Camden?' or, 'Will you take \$2,500, and leave your interest at Selma, and bring Mrs. Johnson with you, and come and take charge of the school at Camden?' Johnson replied, that he would do so; and Sellers then said, that he would give him that sum; whereupon Johnson agreed to leave Selma, and bring his wife with him to Camden to teach.

"The proof further tended to show, that Sellers, on the next day after this interview, told another person (a witness) that the difficulty as to Mrs. Johnson's coming to Camden had been removed, and that he had agreed to give Johnson \$2,500 to bring her with him to teach school at Camden. It further appeared, that Mr. and Mrs. Johnson did shortly afterwards come to Camden, and commenced teaching in the institute, and taught a flourishing and prosperous school there for several years; that Mrs. Johnson was a most excellent teacher, musician, and

disciplinarian, and was believed to be such by the trustees at the time of her election with her husband; and that Johnson was told, in the last interview between him and Sellers and others above mentioned, that the qualifications of his wife had influenced the board of trustees in their election."

There was some other evidence in the case, which, however, has no material bearing on the points here decided.

The court charged the jury, among other things,—

"1. That there were two contracts in this case, which it was necessary that they should construe; first the contract which the plaintiff claimed was made by Sellers; and, secondly, the contract which the defendant claimed was made between Johnson and the trustees."

"4. That if they were satisfied from the evidence that Johnson was elected as principal of the school, and accepted as principal; yet, if the trustees understood that his wife was to come with him, and he accepted the office knowing this understanding, then Johnson was bound by his contract to bring his wife with him."

"9. That it was contended by the plaintiff, that even if they should find that Johnson was bound by his contract to bring his wife with him to teach the school, and refused to comply with his promise, and the promise of Sellers was made to induce him to comply with his contract, and did induce him to do so; still Sellers was bound by his agreement. And the court then told the jury, that the law on this point, which was denied by the defendant, was with the defendant."

"10. That if Johnson was bound, under his contract with the trustees, to bring his wife with him to teach in the school at Camden, and refused to comply with this contract; and Sellers thereupon, to induce him to comply with this contract, promised to pay him \$2,500; and that Johnson, on the faith of that promise, did come and teach with his wife; yet, if they believed from the evidence that he came and taught the same school with his wife that his original contract bound him to teach, then the contract of Sellers was without consideration and void."

These charges, to which the plaintiff excepted, with other matters, are now assigned as error.

D. W. BAINE, with whom were WATTS, JUDGE & JACKSON, for the appellant.

No counsel appeared for the appellee.

WALKER, J.—The counsel for the appellant only contends, that the first, fourth, ninth, and tenth charges given, are erroneous; and we will, therefore, confine our attention to them. Upon the first charge it is not necessary that we should pass, as the question made upon it will not probably again arise.

The court erred in giving the 4th charge. The contracting parties are not bound beyond the stipulations of the contract. One of the parties is not bound to perform an act, not within the stipulations of the contract, because it was understood by the other party that he would perform it, and he knew of that understanding. The effect of the charge was, to hold Johnson bound to bring his wife with him, although he did not contract to do so, because it was known to him that the trustees understood that he was to bring her with him to teach in the school. In the giving of that charge the court erred.—*Sanford v. Howard*, 29 Ala. 684.

[2.] The 9th and 10th charges assert the proposition, that if Johnson contracted to bring and associate his wife with him in teaching the school, and then refused to comply with that contract, a promise by Sellers to give him \$2,500, in order to induce him to comply, would be without consideration. In our judgment, these charges are correct. Johnson, by his contract, was legally bound to bring his wife to teach in the school, if the contract was such as the charge supposes. He had no *right* to violate that contract, and compensate the injured party in damages. It is true, the law would not interpose to compel the performance of the contract; but this is not because he had a right to violate his contract, but because the law supposes the injury done by the violation of it can be sufficiently compensated in damages. A man may commit a

trespass, for which the law would merely give an action to recover damages ; but it does not therefore follow, that he had a right to commit the trespass, being responsible for the damages, or that a promise made to induce him either to commit or not to commit it, would be valid. *Renfro v. Heard*, 14 Ala. 23.

If two parties make a contract, one of them may waive the performance of the contract by the other, and assume some new and additional obligation as the consideration of the performance by the other. Such obligation would be binding. Within this principle fall the cases of *Stoudenmeier v. Williamson*, 29 Ala. 558 ; *Munroe v. Perkins*, 9 Pick. 298 ; and *Lattimore v. Hanson*, 14 Johns. 330 ; also, *Spangler v. Springer*, 22 Penn. St. R. 454 ; *Whiteside v. Jennings*, 19 Ala. 784 ; *Thomason v. Dill*, 30 Ala. 444. Those cases rest upon the ground, that it is competent for the parties to a contract to modify or rescind it, or to waive their rights growing out of it as originally made, and engraft upon it new terms. Here, while there is a subsisting contract with the trustees, and a subsisting obligation to perform it, the proposition of the appellant is, that a promise by a third party to induce its performance, or rather to prevent its breach, was supported by a valid consideration. We do not think the law so regards such a promise.

We deem it proper to remark, that the testimony found in the bill of exceptions does not conclusively show whether Johnson's contract was to bring his wife to teach in the school with him ; and that that question of fact should be left to the determination of the jury upon the evidence. The court could not assume that the resolution for the election of Johnson as principal on the 17th August, 1850, contains all the terms of the contract. The question, what was the contract, must be left to the decision of the jury, upon that and the other evidence in the case.

The judgment of the court below is reversed, and the cause is remanded.

WYNN *vs.* SIMMONS.

[MOTION FOR NONSUIT ON VERDICT OF LESS THAN FIFTY DOLLARS.]

1. *Presumption in favor of ruling of primary court.*—On motion to nonsuit the plaintiff, because the verdict in his favor is less than fifty dollars, (Code, § 2365,) if the record does not show on what ground the motion was overruled, and contains no bill of exceptions or statutory affidavit, the appellate court will presume that the action of the primary court was predicated on a good and sufficient reason.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Holman F. Simmons, against Robert H. Wynn, and sought to recover damages for the defendant's alleged breach of a partnership agreement between him and the plaintiff. The defendant pleaded "the general issue, in short by consent, with leave to give in evidence anything that could be legally pleaded in bar." The jury returned a verdict in favor of the plaintiff, for forty-one 99-100 dollars; and the court thereupon rendered judgment in his favor for that amount, with costs. The defendant afterwards moved "to set aside the judgment and dismiss the case, on the ground that the recovery is less than fifty dollars." On this motion the following judgment was rendered: "Motion having been made by defendant, to set aside the verdict and dismiss the cause, because the recovery is less than fifty dollars; which motion, after argument had thereon, was by the court overruled, and the defendant excepted; the plaintiff having filed no affidavit. It is therefore considered by the court, that said motion be overruled, and that plaintiff recover of defendant the costs of this motion." The overruling of this motion is now assigned as error.

J. J. WOODWARD, and J. E. BELSER, for appellant.

JAS. B. MARTIN, and L. E. PARSONS, *contra*.

STONE, J.—The Code (§ 2365) declares, that “if suit be brought for such amount, [the amount of which the court has jurisdiction,] and a less sum be recovered, unless the amount is reduced below that of which the court has jurisdiction, by a set-off successfully made by the defendant, the judgment must be set aside, and the suit dismissed, unless he, or some one for him, make affidavit,” &c.

In the case we are considering, there is no bill of exceptions setting forth the nature of the defense. A motion to dismiss the suit, based on the fact that the recovery was under fifty dollars, was overruled in the court below. The record does not inform us the ground on which the motion was overruled. We have shown, in the above extract, that there is one contingency in which it is the duty of the court to overrule a motion to dismiss, although the recovery may be less than fifty dollars; namely, when *by a set-off successfully made* the recovery is thus reduced. This, too, in the absence of an affidavit, such as is provided for in section 2365 of the Code. Indulging, as under our rules we are required to do, every reasonable intendment in favor of the correctness of the ruling in the court below, we feel it our duty to presume, there was a good and sufficient reason for the action of the primary court.

Judgment of the circuit court affirmed.

ARNETT'S EXECUTOR vs. ARNETT.

[BILL IN EQUITY BY LEGATEE AGAINST EXECUTOR.]

1. *Equitable relief against probate decree.*—After the final settlement of a decedent's estate before the probate court, the widow cannot come into equity, to obtain an allowance for her support, under a provision in the decedent's will directing that she “be allowed a sufficient support to last her twelve months” from his decease, without showing a sufficient legal excuse for her failure to prosecute her claim before the probate court.

APPEAL from the Chancery Court of Shelby.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Mrs. Lucinda J. Arnett, against the executor of her deceased husband, Thomas Arnett, and sought to recover an allowance for her support and maintenance, under a provision in her husband's will which was in these words: "I also direct, that my wife be allowed a sufficient support to last her twelve months from my decease." The testator died in April, 1849; and letters testamentary on his estate were duly granted by the probate court of Shelby to Mirick J. Horton, one of the executors named in the will. The bill alleged, that the executor took possession of the entire estate, and disposed of the same; that he refused to pay to the complainant the amount to which she was entitled under the clause of her husband's will above copied; that in May, 1855, he made a settlement of his accounts as executor with said probate court, which he claimed to be a final settlement, but which was not so in fact; and that he retained in his hands, in right of his wife, a legacy of over \$700, which the complainant insisted was liable to satisfy her demand.

The executor answered the bill; averring, that the complainant had, prior to his final settlement of the estate, instituted proceedings against him, before the probate court, on the claim which she now sought to enforce, and that said court had dismissed her application; and that his final settlement was delayed several days, in order to give her agent and attorney an opportunity again to prefer her claim. He insisted on the final settlement as a bar to the relief sought, and demurred to the bill for want of equity.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, which the defendant now assigns as error.

S. LEIPER, for the appellant.

JNO. T. MORGAN, *contra*.

RICE, C. J.—The complainant is the widow of Thos. Arnett, deceased. The chancellor has decreed to her two hundred and forty-one 89-100 dollars, under a provision contained in the will of her late husband, which reads thus, "I also direct, that my wife be allowed a sufficient support to last her twelve months from my decease." Her bill was filed several years after the will had been admitted to probate, and some months after the executor had made a final settlement of the estate of the testator in the probate court, to which final settlement she was, in legal contemplation, a party.

It is true, that the claim which the chancellor has by his decree allowed to her in this suit, was not in fact passed upon by the judge of the probate court on final settlement, and was not noticed by him, because neither the complainant nor her attorney was present in person, or asked any action thereon, at the time of the final settlement. But the claim was not withdrawn from the jurisdiction of the probate court by any act or word of the complainant or her attorney. No fraud in the final settlement, nor any special reason for refusing to accord to it its full legal effect, is shown. Nor does it appear that the failure of the probate court to pass upon the claim here allowed by the chancellor to the complainant, was attributable to any other cause, than the neglect or fault of the complainant, in not appearing and urging its consideration.

It is a settled principle, that when the probate court, in a matter of concurrent jurisdiction, has taken cognizance, and proceeded to a final decree, a court of equity will not interfere, unless some special reason for its interposition is alleged, and duly established.—*King v. Smith*, 15 Ala. 264. No such reason is shown in this case, unless the fault or neglect of a party to the proceeding for the final settlement, to appear and urge his claim, could be held to amount to such a reason; and it is impossible to hold it to be so.

It may be, that the probate court erred in not passing on the claim, and that the complainant could, for that error, have reversed its decree, on appeal. But, be that

as it may, when, without having reversed that decree, she comes into a court of equity for relief, she cannot, *whilst her neglect and fault stand unexcused*, obtain relief, by showing merely an error of the probate court which is fairly attributable to her neglect and fault. As the case is now presented, the decree of that court on the final settlement is as conclusive against the complainant, as if by that decree her claim had been passed upon and rejected.

The decree of the chancellor is erroneous, and is reversed; and a decree must be here entered, dismissing the complainant's bill, and she must pay the costs of this appeal, and of the court below.

EX PARTE McLENDON.

[APPLICATION FOR MANDAMUS.]

1. *Failure of party to answer interrogatories.*—If the plaintiff fails to answer interrogatories propounded to him by the defendant, the court is not required to dismiss his suit, (Code, § 2334,) but may either continue the cause until full answers are made, or compel an answer by attachment, or direct a nonsuit.
2. *Construction and effect of conditional order of dismissal.*—An order of court, directing the plaintiff's suit to stand dismissed, if he failed to answer interrogatories propounded to him within one hundred and twenty days, is not final in its character, but may be modified or vacated at a subsequent term; nor does it become effectual, until the default has been judicially ascertained at the next ensuing term.

APPLICATION for a *mandamus* to the circuit judge of the eighth judicial circuit, sitting for Barbour county, to compel the dismissal of a suit therein pending, wherein one Samuel Gilbert was plaintiff, and John McLendon and Matthew Averett were defendants. It appeared from the transcript exhibited with the petition, that the following orders were made in the cause:

“Spring term, 1857. Continued for want of plaintiff's answers to interrogatories, and if not answered within

one hundred and twenty days, plaintiff's suit stands dismissed; and on the further condition, that plaintiff pay all costs in one hundred and twenty days, or his suit to stand dismissed."

"Fall term, 1857. Came the parties by their attorneys, and the defendant moved the court to dismiss, in pursuance of the previous order made at the last term of this court; the answers, as required by said order, not having been filed within one hundred and twenty days. Plaintiff filed answers to the interrogatories in October preceding the motion to dismiss, but after the expiration of the time stated in the order of the last term. The court refused to dismiss, and continued the cause; to which action of the court the defendant excepted."

The record did not show when the interrogatories were filed, nor did it contain any other orders of the court. The refusal of the court to dismiss the suit is the ground of the application for a *mandamus*.

E. C. BULLOCK, for the petitioner.

WALKER, J.—The Code does not require that the court should dismiss the suit of a plaintiff, who fails to answer interrogatories propounded by his adversary within the time prescribed by law. It authorizes the court, either to attach the party, and compel him to answer, or to continue the cause, until full answers are made; or to direct a nonsuit, or judgment by default, to be entered. Code, § 2334.

The order made at the spring term, 1857, that the plaintiff's suit should stand dismissed, if he failed to answer the interrogatories in one hundred and twenty days, was not a final order. The matter still remained *sub judice*; and it was competent for the court, at a subsequent term, to modify or vacate that order.—*Reese v. Billing*, 9 Ala. 263.

The order that the suit should stand dismissed at the end of one hundred and twenty days, in default of the answer, could not become effectual upon the occurrence of the contingency in vacation.—*Ex parte Remson*, 23 Ala. 25; *Edwards v. Lewis*, 18 Ala. 494; *Reese v. Billing*, *supra*.

Until the occurrence of the contingency was judicially ascertained at the next term of the court, the cause was *in fieri*, and it was competent for the court to modify or vacate the order.

The *mandamus* is refused, at the costs of the petitioner.

MCNEILL'S ADM'R vs. COOK & JOHNSON.

[ACTION ON GUARANTY.]

1. *Sufficiency of complaint in action against administrator.*—In an action against an administrator, on a contract made by his intestate in his life-time, a count which does show not that the defendant is administrator is demurrable.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by the appellees, suing as partners, against A. J. Pool, as the administrator of D. S. McNeill, deceased; and was founded on a guaranty, or letter of credit, given by said McNeill in his life-time, which was in these words:

“Mobile, February 5th, 1853.

“I, the undersigned, do by this obligate myself to guaranty and become security to R. J. Cook and E. O. Johnson, (who are doing or going to do a commission business, under the name of Cook & Johnson, in this city,) all debts or liabilities that may be made or contracted by either S. H. McNeill & Co., or S. H. McNeill individually.

D. S. MCNEILL.”

The third and fourth counts of the amended complaint were as follows:

“3. And for that whereas, heretofore, to-wit, on the 5th day of February, 1853, said D. S. McNeill executed his certain other writing, bearing date the day and year last aforesaid, and delivered the same to the plaintiffs, in the words and figures following,” &c. “And plaintiffs

aver, that they accepted said instrument when the same was delivered to them, and, relying on the same, and on the guaranty and security therein given, (of which said D. S. McNeill had notice,) advanced a large sum of money on account of the debts and liabilities of said S. H. McNeill & Co., to-wit, the sum of \$1,961 61, at different times after the execution of said writing, and by the 9th December, 1853, and to said S. H. McNeill individually, by the 24th February, 1854, \$660 90; that some time about the month of December, 1853, or before that time, said D. S. McNeill departed this life; that said S. H. McNeill & Co. and S. H. McNeill individually, at the time said advances were made for the purpose of paying their liabilities as aforesaid, or soon thereafter, were insolvent, and no money could have been made out of them by due course of law; and that said several sums of money, with the interest thereon from the time the several sums composing said amounts were advanced, are now due as aforesaid."

"4. And plaintiffs claim the further sum of \$2,307 38, due on a certain written instrument, executed by said D. S. McNeill, and delivered to plaintiffs on the day the same bears date, in words and figures as follows," &c. "And plaintiffs aver, that said instrument was accepted by plaintiffs on the day the same bears date, of which said intestate then and there had notice; that upon the faith and credit of said instrument, they advanced to said S. H. McNeill, on the 7th February, 1853, and at different times thereafter between that day and the 2d April, 1853, the sum of \$1,961 90, and to S. H. McNeill individually the further sum of \$660 .90, at different times between the 7th February, 1853, and the 24th February, 1854; that they advanced and paid out said several sums of money solely on the credit of said instrument; of all which said D. S. McNeill had notice; which sums, with interest thereon, are due and unpaid, and have not been paid by said S. H. McNeill & Co. or S. H. McNeill."

The defendant demurred to the third count, on ten specified grounds, the last of which was, "because it does not show that there was ever any consideration passing

from the plaintiff to the defendant, or that any cause of action existed at the commencement of this suit against the defendant." The judgment entry recites, that a demurrer was also interposed to the fourth count; but the record nowhere shows what the specified grounds of demurrer were. The overruling of the demurrers to these two counts, with other matters, is now assigned as error.

JNO. D. F. WILLIAMS, for the appellant.

BYRD & MORGAN, *contra*.

STONE, J.—In neither the third nor the fourth count of the complaint, is there any averment which connects Pool, the defendant, with "said D. S. McNeill," or which shows any right to maintain the action against him. For this reason, the demurrer to those counts should have been sustained, on the authority of *Ikelheimer v. Chapman's Adm'rs*, at this term.—See, also, *Crimm v. Crawford*, 29 Ala. R. 623; *George v. English*, 30 Ala. R. 582.

The other points made by the argument are not so presented as that we can consider them. They are all considered in *Cahuzac & Co. v. Samini*, 29 Ala. 288.

Reversed and remanded.

HASSELL vs. HAMILTON.

[DETINUE FOR SLAVE.]

1. *Conclusiveness and effect of decree of appellate court in chancery cause.*—A decree of the supreme court of a foreign State, rendered on appeal from a decree of the chancellor, must be regarded by our courts, in the absence of proof to the contrary, as the only decree which has any force in the cause in which it was rendered; nor can the record and pleadings be looked to, in such case, for the purpose of showing and correcting a mistake in the decree of the appellate court.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ROBT. DOUGHERTY.

THIS action was brought by William Hassell, as trustee of Mrs. Elizabeth Hamilton, against David Hamilton, to recover a slave named Letitia, a girl about fourteen years of age. On the trial, as appears from the bill of exceptions, the plaintiff produced and read in evidence a transcript, duly certified, from the records of the supreme court of Tennessee, on appeal from a decree rendered by the chancery court at Columbia, in a suit instituted by Mrs. Elizabeth Hamilton, suing by her next friend, against Alexander C. Hamilton, her husband. That suit was instituted on the 21st September, 1848, and sought a divorce *a vinculo matrimonii*, and also to restrain the defendant from selling or otherwise disposing of certain slaves, which Mrs. Hamilton claimed under a decree rendered by the chancery court at Columbia in 1843. The slaves embraced by the decree of 1843, as described in the bill, were "Sophia, George, Henry, Isaac, Stephen, Mourning, *Letitia*, and Dick, and *Letitia*;" and the bill alleged, that all these slaves were in the defendant's possession, "except Sophia, who has died, and *Letitia*, who was sold by him." On the 28th March, 1850, on final hearing on pleadings and proof, the chancellor rendered a decree in favor of the complainant; granting her a divorce, restoring to her all the rights of a *feme sole*, and settling the negroes on a trustee for her use, benefit and support. In the chancellor's decree, the negroes embraced in the decree of 1843 are described as "George, Henry, Isaac, Mourning, *Letitia* and Dick;" and, after reciting the death of Sophia and the sale of *Letitia* by the defendant, the decree directs that the title "to all said several negroes, with their increase, be vested in William Hassell, trustee," &c. On appeal from this decree, as the said transcript showed, the supreme court rendered a decree in favor of the complainant below, granting her a divorce, and settling the negroes on her as alimony; and the negroes were described in this decree as in the chancellor's decree.

"The plaintiff proved, that the girl *Letitia*, here sued

for, was the daughter of Sophia, and was born in 1842; that she, together with George, Henry, Isaac and Mourning, mentioned in said record, was in the possession of Alexander C. Hamilton in Tennessee in 1848, and, in the fall of that year, was run off by him to Dallas county, Alabama, and placed in the possession of the defendant, who retained possession of her up to the commencement of this suit; that another slave, a woman named *Letitia*, (not the slave in controversy,) was given to Mrs. Hamilton by her father, in 1839, at the same time with the others; that this woman was sold by said Alexander C. Hamilton, prior to the year 1848, and prior to the commencement of the chancery suit referred to in said record. The plaintiff proved, also, the value of the slave sued for, and of her hire."

The defendant then read in evidence a certified transcript of the said decree of 1843, by which the slaves "Sophia and her children, to-wit, George, Henry, Isaac, Stephen, Mourning, *Letitia* and Dick," were settled on him and his wife during their joint lives, but not to be subject to his debts.

"This was all the evidence in the case relating to the plaintiff's right and title to the slave in controversy; and thereupon the court charged the jury, that the plaintiff could not recover; to which charge the plaintiff excepted," and which is now assigned as error.

WM. M. BYRD, for the appellant.

JNO. T. MORGAN, *contra*.

RICE, C. J.—If the plaintiff has any title to the slave *Letitia*, here sued for, it is founded upon and derived from the decree rendered by the chancery court at Columbia in the State of Tennessee, or the decree rendered by the supreme court of that State, set forth in the record. He shows no other source of title. And he cannot claim under both of those decrees. They were rendered in the same case, and upon the same pleadings and evidence. The former is the decree of the court of original jurisdiction; the latter the decree of the appellate or revising

court. The latter was made, not on *writ of error*, but on *appeal* from the former; and does not purport to be an affirmance, either in whole or in part, of the former, but a new decree made upon the pleadings and proofs by the supreme court of Tennessee, on the appeal taken from the decree of the chancery court at Columbia.

The judgments of the courts of record of a sister State, when duly authenticated and proved, are *prima-facie* evidence of the jurisdiction of the courts by which they were rendered, and of the correctness of its exercise. *Gunn v. Howell*, 27 Ala. R. 663. And as the decree of the supreme court of Tennessee purports to be one rendered on a re-hearing of the whole cause, matters of fact as well as law, upon *appeal* taken from the decree of the chancery court at Columbia, we must intend, in the absence of proof of any law of Tennessee to the contrary, not only that the decree of the appellate tribunal is in accordance with the law of that State, but that it is the only decree which has any force as a decree in the case in which it was rendered.—*Gelston v. Codwise*, 1 Johns. Ch. R. 194, 195; *McClellan v. Crook*, 7 Gill's R. 333.

Looking to that decree as the plaintiff's only source of title here, the present case is of easy solution. That decree does not confer upon the plaintiff any title to the slave sued for in this action. It does not embrace her, but does embrace *another slave of the same name*.

It is contended by the plaintiff, that the supreme court of Tennessee really *intended* by its decree to confer upon him title to the slave here sued for; that by *mistake* the decree does not confer on him title to that slave, but to another of the same name; and that this mistake and intention of that court appear clearly, as well from the whole record of the suit in which its decree was rendered, as from the other matter adduced as evidence on the trial of the present case. If that be so, it is unavailing to the plaintiff, in this action, unless the courts of Alabama assume the power to correct the mistakes they may find in the decree made by the supreme court of our sister State in a case within its jurisdiction, or to *reform* the decree so as to make it speak the unexpressed intention

of that court. The courts of Alabama have no such power, and cannot in any way change the decree of the supreme court of Tennessee, and, by such change, *create* for the plaintiff a title to a slave, which, if that court intended to confer on him, it failed to confer.

Judgment affirmed.

JOHNSON'S ADM'R vs. JOHNSON.

[ACTION FOR MONEY HAD AND RECEIVED, BY WIFE'S ADMINISTRATOR AGAINST SURVIVING HUSBAND.]

1. *Husband's marital rights.*—Money paid to the husband, during his wife's lifetime, by the executors of her deceased father, on account of her interest as a legatee in the debts due to the estate, becomes the absolute property of the husband, unless the bequest created a separate estate in the wife; but the husband's marital rights do not attach to money collected by the executors after the death of the wife, although paid over to him by the executors.
2. *When action lies for money had and received.*—An action for money had and received lies against the husband, in favor of the personal representative of his deceased wife, to recover money paid over to him by the executors of the wife's father under a legacy to her, to which his marital rights never attached.
3. *When administrator cannot sue.*—If an executor makes an unauthorized sale of lands, as to which his testator died intestate, the administrator of one of the deceased heirs has no interest in the proceeds of sale, and cannot maintain an action for any portion thereof.
4. *Construction of will as to reversionary interest after widow's death.*—Where a testator directed "the remainder" of his estate, after payment of debts, to be equally divided among his wife and children; bequeathing the interest of the widow to her during life or widowhood; authorizing his executors, by a codicil, to sell any part of the real estate which they might deem advisable, and directing them to divide the proceeds of sale according to the main body of the will,—*held*, that the testator died intestate as to the reversionary interest in that part of the real estate which was allotted to the widow during life or widowhood, and that the executors had no authority to sell it after her death.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by the administrator of Mrs. Jemima G. Johnson, deceased, against William Johnson, her surviving husband, to recover certain moneys which the defendant had received, under a legacy to his wife, from the executors of her deceased father, George Phillips. The will of said George Phillips, with the codicil thereto, both dated on the 10th September, 1834, and admitted to probate on the 12th October, 1835, was in these words :

“It is my will and desire, that all my just debts be first paid, and the remainder of my estate, both real and personal, to be managed and distributed as follows: Within one year after my decease, the whole of my estate, both real and personal, to be appraised by disinterested persons, on oath, and to be equally divided amongst my beloved wife, Polly Phillips, and my eight children, share and share alike, viz., Matilda E. Blevins, (formerly Phillips,) William S. Phillips, Francis M. Phillips, Jemima G. Johnson, (formerly Phillips,) Mary Ann Phillips, Emily W. Phillips, and John B. Phillips. It is my will and desire, also, that the real estate that may be allotted by said division to my beloved wife shall include the mansion-house in which I now dwell, the *curtilledge* thereof, and a suitable quantity of my lands adjoining the same for cultivation; to hold the said real estate for and during the term of her natural life or widowhood, and after marriage with the consent of my executors, or a majority of them. And it is further my will and desire, that the shares or divisions(?) that may be allotted by said division to my different daughters shall vest absolutely in them and their respective heirs of their bodies forever. It is my will and desire, also, that the division and distribution of my estate above mentioned be made by my executrix and executors, or by commissioners appointed by the orphans' court. My son-in-law, William Blevins, in right of his wife Matilda, has received from me cash and property to the amount of \$2,950; my son, William S. Phillips, has received from me cash and property to the amount of \$2,500; my son, Francis M. Phillips, has received from me cash and property to the amount of \$6,197; and my son-in-law,

William Johnson, has received from me, in right of his wife Jemima, cash and property to the amount of \$2,463; which several amounts are to be deducted from their respective shares or dividends of my estate, but no interest is to be charged on the said several amounts. I do hereby nominate and appoint, as the executors of my last will and testament, my beloved wife Polly Phillips, my sons-in-law, William Blevins and William Johnson, and my sons, William S., Francis M., and George H. C. Phillips."

Codicil: "My executors, or a majority of them, may bargain, sell and grant such part or parts of my real estate as they, or a majority of them, may think it advisable to dispose of, at either public or private sale; and the proceeds of such sale shall be divided and distributed according to the provisions of the main body of my will."

"The plaintiff proved, that Mrs. Johnson married the defendant in 1826 or 1827, and died on the 28th May, 1837; that she had children living at the death of the said testator, her father, and at the time his will was executed, and left three children surviving her; that the testator's real and personal property was divided, by commissioners appointed by the orphans' court, in December, 1835, within a year after the testator's death, under the provisions of said will, and the share of each legatee was delivered to him or her respectively; that the testator had a large sum of money due to him from different persons, by notes and accounts, which, in the latter part of the year 1835, and immediately after said division and allotment, were placed by the other executors in the hands of said George C. Phillips, one of the executors, with the understanding that he would collect the same, and pay outstanding debts, and divide the overplus among the several legatees as they were respectively entitled to share in such collections; that said legacies were assented to, by all the executors, prior to December, 1835; that said George C. Phillips, prior to the death of Mrs. Johnson, did collect said money so far as the same could be collected, and with it paid the debts of the estate then unpaid, and the costs and expenses of the administration,

amounting to \$500 or \$600; that from time to time, when he had collected an amount that he thought worth dividing, he divided the same out amongst those to whom he thought it belonged under the will; and that in this manner, and under these circumstances, he paid to the defendant the several sums of money specified in the following receipts." (The receipts here set out are six in number, and amount to about \$1885, the dates being May 31, 1837, June 25, 1840, April 29, 1842, May 31, 1842, June 13, 1844, and November 14, 1848.)

"The money specified in the receipt of April 29, 1842, was for money realized by the executors from the sale of lands mentioned in said will, in which Mrs. Polly Phillips had a life estate; which sale was made in 1842, after the death of Mrs. Johnson. George C. Phillips further testified, that he paid over the several sums of money specified in said receipts to the defendant, under the belief that he, as the husband of Mrs. Jemima Johnson, was entitled to receive it, although she was dead. The defendant then introduced in evidence two receipts given by him to the executors of said George Phillips, deceased," (which were dated respectively the 4th January, 1837, and the 10th May, 1837,) "and proved, that he received the money specified in said receipts prior to the death of his wife; that one of said receipts was for his wife's share of the crop of cotton raised in 1835, and the other was for her share of moneys collected on the said notes and accounts placed in the hands of said George C. Phillips, and which had been collected by him up to the date of said receipt."

"This being all the evidence, the court charged the jury, that if they believed the evidence, they must find for the defendant; to which charge the plaintiff excepted, and, in consequence thereof, took a nonsuit."

The charge of the court is now assigned as error, and motion is made to set aside the nonsuit.

JNO. T. MORGAN, for the appellant.

WM. M. BYRD, and ALEX. WHITE, *contra*.

WALKER, J.—In another case between the same parties, we decided, at the present term, that Mrs. Jemima Johnson did not take a separate estate under the will of her deceased father, George Phillips. That decision establishes the right of the appellee, Wm. Johnson, to retain all the money paid to him, *in the lifetime* of his deceased wife, on account of her interest as a legatee in the debts due to her deceased father. It also overthrows the argument in favor of the appellant's right to recover the other money in controversy, so far as it is based upon the idea of a separate estate in Mrs. Johnson. There are two distinct classes of funds, which were received by the appellee, after the death of his wife, from the executors of George Phillips, deceased. One class embraces the money derived from the collection of the debts due the deceased. The other embraces the money derived from the sale of the lands, in which the widow of George Phillips had a life estate. The rights of the parties in reference to these two different classes of funds must be separately considered.

At the division, had within a year after the testator's death, the notes and accounts belonging to the testator's estate were left undivided, and they were placed in the hands of one of the executors by the others, who was to collect the same, pay off the debts of the estate, and divide the remainder among the legatees. The legacies were assented to by all the executors, previous to December, 1835, when the division was had. The executor, from time to time, as he made collections, paid over to the appellee, on account of his wife's legacy. We have already decided, that the plaintiff had no right to recover the money paid to the appellee during his wife's lifetime, because, as to it, there was a plain and complete reduction to actual possession during the coverture.

As to the money received by the husband after the wife's death, it does not appear that any of it was collected and in the hands of the executor before her death. We think the probability is, that all the money received by the husband after the wife's death was collected after her death. We therefore leave undecided the question as to

the rights of the parties in any money collected by the executor before the death of Mrs. Johnson, and afterwards paid over to her husband.

As to money, received on the notes and accounts, which remained uncollected at the death of Mrs. Johnson, and which was paid to the executor after her death, and then by the executor paid to Johnson, we decide that the marital rights of Johnson never attached.

The notes and accounts were but choses in action, in which the defendant's (appellee's) wife had an interest. If she had been the exclusive owner, and the husband had had actual possession of them, they would have gone upon the wife's death to her administrator; for it is settled law in this State, that upon the wife's death, her choses in action do not go to the husband, as administrator or otherwise. The fact that she has only a partial interest in them, and that they are in the hands of an agent, instead of in actual possession, certainly adds nothing to the husband's right. So much of the money as was collected by the executor after the death of Mrs. Johnson, was a fund in which the defendant had no interest, and any payment to him out of it was wrongful; and the true owner, the plaintiff in this suit, has a right to recover it back from him. We think the decisions of this court fully sustain the position, that the administrator of Jemima Johnson's estate has a right to ratify the wrongful payment to the defendant, and sue him in an action for money had and received.—*Vandyke v. The State*, 24 Ala. 81; *Prater v. Stinson and Wife*, 26 Ala. 456; *Bank v. Fry*, 23 Ala. 770; *Smith v. Wiley*, 22 Ala. 396.

The court could not assume that none of the money paid over to the defendant was collected after the death of Mrs. Johnson; and there was, for that reason, error in the charge given.

The widow of the testator took a life estate in certain lands. After her death, those lands were sold by the executors, and the defendant took a share of the proceeds of the sale of the land. Notwithstanding this sale was made after the death of Mrs. Johnson, the plaintiff in this suit has no right to recover the money so received

by the defendant. The testator, George Phillips, died intestate as to the interest in that land remaining after the death of the widow. The land, therefore, descended to the heirs, and, after the widow's death, their right to the possession attached. As the land is not devised, and as it descended to the heirs, the sale by the executors was unauthorized, and the administrator of one of the deceased heirs could have no interest in the proceeds of the sale. The interest of Mrs. Johnson, upon her death, descended to her heirs, and those heirs are the persons injured by the unauthorized sale. Her administrator has no claim to the proceeds of the sale.

The conclusion that the plaintiff had no right to recover the proceeds of the sale of the land from the defendant, is a necessary sequence from the premises assumed, that the testator does not by his will bequeath the interest in the land allotted to the widow after her death. To prove the correctness of the premises assumed, it is necessary to examine the will.

In the first clause, the testator directs the payment of his debts. In the next, he directs that "the remainder of his estate be managed and distributed as follows;" and then proceeds to direct that the whole estate, both real and personal, be equally divided amongst his wife and eight children, and that his wife shall hold what may fall to her upon the division during her natural life or widowhood, and after her marriage with the consent of the executors. By a codicil, the executors are authorized to sell, either at public or private sale, any part of the real estate, which they may deem it advisable to sell; and they are directed to divide the proceeds according to the main body of the will. "The remainder of the property" and "the whole estate," expressions found in the second clause of the will, cannot include the reversionary interest, because the remainder of the property, the whole of the estate, is directed to be divided between the *widow* and the children. It would be unreasonable to construe the will as directing a participation by the widow in the reversionary interest after her death. Everything which is bequeathed in the second clause is to be divided within a year after the tes-

tator's death, and in the lifetime of the widow, who is to share equally with the children. By the whole of his estate, the testator meant that the entire specific property was to be taken into the division—not that the entire interest in the land bequeathed to the widow should be included in the division.

It is impossible to understand the authority to sell as including the reversionary interest, because the executors are required to divide the proceeds of the sale according to the provisions of the main body of the will. If it did, it would follow that the reversionary interest accruing after the widow's death would be equally divided between her and the children.

For the error in the charge pointed out, the nonsuit in this case is set aside, the judgment reversed, and the cause remanded.

HENDERSON vs. SIMMONS.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Rent of dwelling-house charged against administratrix.*—An administratrix is chargeable, on final settlement of her accounts, with the reasonable rent of a house and lot belonging to the estate, which, instead of renting out, she herself occupied.
2. *Expense of repairing dwelling-house allowed as credit.*—The expense of repairing a dwelling-house belonging to the estate should be allowed as a credit to the administratrix, on proof that the repairs were necessary, the price reasonable, and the account paid by the administrator.
3. *Proof of payment by administrator.*—The creditor's receipt is sufficient to entitle the administrator to a credit for the payment of the demand, although it appears that the matter is left open for adjustment on settlement of their private accounts.
4. *Expenses of agent allowed as credit.*—Although it is the duty of an administrator to perform all the ordinary services of the administration, if reasonably within his power; yet, for extraordinary services, such as in their nature require appliances or a degree of skill not within the command of ordinary persons, he may employ agents; and the reasonable expenses of such agents are a proper charge against the estate.

5. *Competency of surety as witness for principal.*—The surety of an administrator is not a competent witness for his principal, on final settlement of the latter's accounts, (Code, § 2302,) to prove an item of credit.
6. *Expenses of propounding supposed will for probate allowed.*—Reasonable costs and expenses, incurred by an executor in propounding for probate a paper which purported to be the last will and testament of the decedent, are a proper charge against the estate, if the executor acted in good faith, and had no reasonable grounds for doubting the validity of the paper; and if the executor resigns the trust, without paying such costs and expenses, and receiving no credit on account thereof, his successor may pay the demand, and charge the estate with the payment; but this item only includes proper expenses incurred in a fair and lawful trial of an issue to test the validity of the paper, and does not embrace money paid in compromise of a contest respecting its validity.
7. *Attorney's fees not allowed as part of costs of contested probate.*—Reasonable attorneys' fees, paid by the administrator *de bonis non*, on account of services rendered on the contested probate of the supposed will, are allowable as a part of the costs of probate, if the attorneys were employed by the proponent and executor; *secus*, if it appears that the attorneys were employed by the principal legatee under the supposed will, who afterwards became the administrator *de bonis non*.
8. *Costs of suit on witness-certificates not allowed.*—The costs of suit against an administrator, on witness-certificates issued in an action at law instituted by him or his predecessor, are not a proper charge against the estate, when it appears that he had in his hands, at the time when suit on the certificates was instituted, assets sufficient to pay them.
9. *Allowances to administrators generally.*—The law does not visit administrators, who fill a fiduciary relation which is indispensable in our judicial system, with severer intendments than are indulged against agents generally; "some of the objections taken in this case betray a too rigid economy in the matter of allowances."

APPEAL from the Probate Court of Talladega.

IN the matter of the estate of Edward Henry, deceased, on final settlement of the accounts of the administratrix, Mrs. Angeline Simmons, at the instance of a succeeding administrator *de bonis non*, John Henderson. The intestate died in September, 1852, leaving a widow, but no living children; but his widow, about six weeks after his death, gave birth to a posthumous child. On the 20th September, 1852, a paper which purported to be the last will and testament of the decedent, and in which the great bulk of his estate was bequeathed and devised to his widow, after deducting trifling legacies to his two adopted children, Edward and Mary J. Henry, was propounded for probate by William McPherson,

the executor therein named, and admitted to probate by the court. The validity of this paper was shortly afterwards contested by the said Edward and Mary J. Henry, and an issue *devisavit vel non* was made up between them and the executor. The case was strongly litigated, and involved the parties in heavy costs and expenses; but a compromise was finally effected, by which the contestants withdrew their objections to the probate. After the resignation of McPherson as executor, (the date of which is not shown by the record,) letters of administration *de bonis non* were granted to the decedent's widow, who afterwards married James W. Simmons, and who continued to discharge the duties of the trust until the 18th December, 1854, when she was succeeded by Thomas P. Renfro, the sheriff of the county, who in his turn was succeeded by John Henderson. On the final settlement of the accounts of Mrs. Simmons, numerous exceptions were reserved by both parties to the rulings of the probate court, and errors are here assigned by both parties. The material matters presented by these exceptions, so far as they are necessary to a correct understanding of the opinion of this court, may be thus stated:

“Henderson moved to charge the administratrix, on the debit side of her account, as per an item in her return of a sale of the property made by her on the 18th January, 1853, which is as follows: ‘To A. Q. Nicks, for Angeline Henry, one hundred bushels of corn, (take all more or less,) at forty cents per bushel.’ There was no amount carried out in said sale-bill, opposite said item; but, interlined below it, was the following memorandum: ‘The above corn, all except forty bushels, turned over to James W. Simmons.’ It was proved by one McKenzie, that he, at the request of Simmons, delivered to various persons, out of the crib on the place of the deceased, after a sale of said property at Fayetteville in said county, one hundred bushels of corn. William McPherson proved, that he, at the request of said Simmons, measured out and sold to various persons at the Fayetteville place, in the spring or summer after the sale of the perishable property, thirty-one $\frac{5}{8}$ bushels of corn belonging to said deceased, which

was different from that proved by McKenzie. This being all the evidence in regard to said corn, the court charged the administratrix with only one hundred and eight bushels of corn, and refused to charge her, on motion of the administrator *de bonis non*, with one hundred and seventy-nine $\frac{1}{8}$ bushels; to which ruling of the court the administrator *de bonis non* excepted," and which he now assigns as error.

Henderson moved the court, also, to charge the administratrix with the rent of a house and lot in Talladega belonging to the estate. "To sustain this motion, he proved that said house and lot had been rented out by her, for the year 1853, for \$125, with which amount she had charged herself in her account; that she, with her father, George Elrod, occupied said house and lot during the early part of the year 1854; that her father moved out of the house in the early part of the year, and she and her husband (James W. Simmons, with whom she had intermarried) continued to occupy it for the remainder of the year 1854; that said house and lot was reasonably worth for that year from \$75 to \$100, and (in the opinion of one witness) would have brought that at public outcry. Another witness testified, that the rent of said house and lot was worth \$100, and that, in his opinion, it would have brought that at public outcry." The decedent's will, and an act of the legislature changing the names of his two adopted children, and making them his legal heirs, (which act was passed on the 29th January, 1850,) were also read in evidence on this motion. "There was no evidence that said administratrix had ever dissented from said will. She charged herself, in her account, with the hire of all the negroes for the year 1854, and the rent of all the real estate except said house and lot in Talladega. This was all the evidence on said motion; and thereupon the administrator *de bonis non* moved the court to charge the administratrix with the value of the rent as proved; which motion the court overruled and refused." This ruling of the court, to which Henderson excepted, is made the ground of an assignment of error by him.

The administratrix claimed a credit for \$265, (as per

voucher No. 1 in her account,) being the amount of an account due to George Elrod for repairs on dwelling-house in 1854. The necessity of these repairs, and the performance of the work by Elrod, were proved by the administratrix; but there was no evidence of the value of the repairs, or that the prices charged were reasonable. The court intimated an opinion, that the item should be rejected, because the account did not appear to be receipted, and there was no proof of its payment; but postponed a decision on the question until the following morning, to allow the administratrix to make proof of the payment. When the account was produced next morning, a receipt by Elrod was endorsed on it, and above the receipt was a written memorandum, signed by James W. Simmons, in these words: "The foregoing account, if allowed to Angeline Simmons, as late administratrix of Edward Henry, deceased, in her final settlement with the court and her successor, will be allowed to George Elrod in his settlement of his agency in that behalf, provided that no item so charged shall be allowed more than once." "On this evidence, with proof of the fact that said Elrod was her agent for that purpose, as well as in conducting her business generally, the administratrix asked the allowance of a credit for said voucher. Henderson then proved, that said statement signed by Simmons was written out by the attorney of Mrs. Simmons, without any authority from her, (except that he knew said Simmons was her husband, and that Elrod had been her general agent in attending to the business of the estate, and that she claimed a balance in her favor on settlement of said agency;) that the receipt was written by Elrod after said statement was signed by Simmons, and after the trial was commenced; and that no money was in fact paid by Mrs. Simmons on said voucher, but that said receipt was signed by Elrod in consideration and on the faith of said agreement signed by Simmons. There was proof, also, showing there was a long and unsettled account between said Elrod and Mrs. Simmons, relative to Elrod's said agency; that each party claimed that, on a settlement between them, there would be a balance in his or her favor; and that the amount

contained in this voucher was one of the items claimed by Elrod on said settlement. On this evidence, the court allowed the administratrix a credit for the full amount of said account;" to which Henderson excepted, and which he now assigns as error.

The administratrix also claimed a credit for \$262 80, (as per voucher No. 46 in her account,) being the aggregate amount of the several sums paid by her to an agent, between the 30th November, 1852, and the 8th March, 1854. The items composing this voucher were thus stated: "Amount paid agent for going to plantation and collecting property, (six days,) \$15;" "amount paid agent for one day's attendance, \$2,00;" "attention to advertising, \$2,00;" "hauling plunder, and having it appraised, \$3,00;" "one day's attendance, \$2,00;" "going to lower end of county, and bringing up negroes to hire out, \$12,00;" "hiring negroes, (one day,) \$2,00;" "furnishing wagon, and hauling negroes to Talladega, \$3,00;" "getting papers from McPherson, (two days,) \$4,00;" "attending to appraisement of property at Elrod's, \$2,00;" "going to lower end of county, and selling property, (eight days,) \$24,00;" "agent's expenses, \$2,75;" "cash advanced, \$,50;" "furnishing one hand to gather and take care of property, (eleven days,) \$11,00;" "going to lower end of county, taking notes, and making settlement, (seven days,) \$14,00;" "furnishing hand to measure corn and other things, (eighteen days,) \$18,00;" "expenses paid agent, \$,55;" "drawing off a list to return to court, \$3,00;" "collecting in Coosa, (two days,) \$2,00;" "auctioneer of sale, \$1,00;" "drawing sale-bill, \$2,00;" "F. M. Thomason, auctioneer at sale, \$5,00;" "agent to travel through Coosa, Talladega, and Shelby counties, to bring suits, (twelve days and expenses,) \$36,00;" "paid J. W. Simmons to clerk, \$3,00;" "agent to attend court, (nine days,) and collect, \$27,00," "agent to go to lower end of county on business, (five days,) \$15,00;" "paid agent to attend at Talladega, and take depositions, (one day,) \$2,00;" "paid agent to go to Fayetteville to rent out land, (two days,) \$6,00;" "paid agent for attending to business in lower part of county, (eight days,) \$24,00;"

“paid agent to go to lower end of county on business, (three days,) \$9,00;” “court expenses at Rockford, \$10,00.” The affidavit of George Elrod, “who was shown to be the agent who rendered the services charged in said account, was the only evidence offered by the administratrix to sustain said voucher.” It was admitted, that said Elrod was one of the sureties on the official bond of the administratrix. Henderson objected to the allowance of said account as a credit to the administratrix, “because said Elrod was not a competent witness to prove said account, and because the items therein charged were not proper charges against said estate.” The court overruled the objection to the competency of Elrod as a witness to prove the account, and allowed the administratrix a credit for \$130 on said voucher; to both of which rulings Henderson excepted, and which he now assigns as error.

The administratrix claimed credits for vouchers Nos. 41, 44, 47, 48, 49, 50, 52, 53, 58, 61, 65, 66, and 77, which were contested by Henderson, and which were all taken up and tried together by consent. Voucher No. 41 was the obligation of Mrs. Simmons, her husband and father, to pay Edward Henry, jr., \$2,300 in notes on good and solvent men, and was proved to have been given in compromise of the contest respecting the probate of the will, as above stated. Vouchers Nos. 44, 57, 61, and 77, were receipted accounts for attorneys’ fees paid by the administratrix, on account of professional services rendered on the contest of the will; and it was shown that these attorneys were all employed by Mrs. Simmons before she became the administratrix of the estate. The other vouchers were receipts for witness-certificates, clerk’s fees, sheriff’s fees, &c., in the same case. The court refused to allow the administratrix a credit for voucher No. 41, (being for money paid Edward Henry on the compromise,) but allowed her credits for all the other vouchers so far as they were proved to have been paid; and to these rulings of the court exceptions were reserved by each party,—to the rejection of voucher No. 41 by the admin-

istratrix, and to the allowance of other vouchers by Henderson.

The administratrix also claimed a credit for voucher No. 67, amounting to \$79 86, which was the amount paid by her on several judgments recovered before a justice of the peace on certain witness-certificates. "The proof about this was, that said suits were instituted on witness-certificates, issued by the clerk of the circuit court of Talladega county at the spring and fall terms, 1854; that the witnesses had been summoned at the instance of plaintiff, in a case in which Mrs. Simmons, as the administratrix of Edward Henry, was plaintiff, and B. M. Fluker was defendant; that said suits were brought against Thomas P. Renfro, who was then the administrator of the estate, on the 31st December, 1854; and that the costs accruing on said suits were about \$16. The account of the administratrix, as filed, showed that about \$14,370, including the sale of the personal property, and notes mostly good, had gone into her hands, all of which were due long before said suits on the witness-certificates were instituted." On this evidence, Henderson objected to an allowance of a credit to the administratrix for any part of the costs of said suits, and reserved an exception to the overruling of his objection.

HENDERSON & MCGEE, for the appellant.

PARSONS & J. WHITE, *contra*.

STONE, J.—The facts in this record are not full enough, to satisfy us that the probate court committed any error in the matter of the corn sold.

Mrs. Simmons, having occupied the house and lot in the town of Talladega during the greater part of the year 1854, is chargeable with a reasonable rent therefor. *Smith v. King*, 22 Ala. 558.

The court did not err in allowing voucher No. 1. The repairs on the house and lot are shown to have been necessary, and the testimony satisfies us that they were performed. We find nothing in the record to convince us that the repairs were not worth the price paid; but, on

the contrary, we think it was reasonable. Mr. Elrod has receipted for this demand; and notwithstanding the subject is still left open for adjustment between him and Mrs. Simmons in their private accounts, it can never again be made a charge against the estate. There was no error in allowing this item.—Pinckard v. Pinckard, 24 Ala. 250.

It is evidently the duty of an administrator, to perform all the ordinary services of the administration, if reasonably within his power. For these *ordinary* services in performing *ordinary* duties, he is not entitled to special and extraordinary compensation. For expenses necessarily incurred in and about the administration, he is entitled to be reimbursed.—See Newberry v. Newberry, 28 Ala. 691. For extraordinary services, and for such as in their nature require a degree of skill or appliances not within the command of ordinary persons, he may employ agencies; and reasonable expenses in this way incurred for the benefit of the estate, are a proper charge against such estate. Pinckard v. Pinckard, 24 Ala. 250; Reese v. Gresham, 29 Ala. 91; Shepherd's Digest, 162, 164–5.

Mr. Elrod was surety of Mrs. Simmons on her administration bond. If a decree be rendered against Mrs. Simmons, and execution returned no property found, an execution can then issue against him, also, for the collection of such decree.—Code, § 1922. Voucher No. 46 rests alone on Mr. Elrod's evidence. He was not a competent witness for the administratrix; and this item, without other proof, should be rejected.—Code, § 2302; McCreeliss v. Hinkle, 17 Ala. 459.

It is the privilege, if not the duty, of one named as executor of a paper purporting to be a last will and testament, to propound it for probate. If he have no knowledge or reasonable grounds on which to predicate a well grounded suspicion against the legality of the will, and propound the paper in good faith, he but carries out the intention with which he was appointed. Any reasonable costs and expenses incurred by him in the honest endeavor to give effect to the will, is a proper charge on the estate in his hands. Further, if he, after incurring such expenses, resign the trust without making payment, and

receive no credit in his account for such expenses, a succeeding administrator, in the execution of the will, may pay such expenses, and charge the estate therewith.

On the other hand, if the executor incur expenses in the fruitless attempt to establish a will, when there exist, within his knowledge, good grounds against its validity, a different rule prevails. This question, in a great degree, depends on the good faith with which the executor has acted. We lay down no absolute rule for the government of all cases, for each must, to a considerable extent, depend on its own circumstances. The right to charge the estate, however, in all cases, will be limited to proper expenses incurred in a fair and lawful trial of the issue *devisavit vel non*. It cannot be so extended as to embrace money paid to silence opposition to the establishment of the will.—Koppenhaffer v. Isaacs, 7 Watts, 170; Rogers' appeal, 1 Harris, (Penn.) 569; Scott's estate, 9 Watts & Serg. 98; Geddis' appeal, 9 Watts, 284; Bradford v. Boudinot, 3 Wash. Cir. Ct. 122; 1 Wms. on Ex'rs, 271; 1 Lomax on Ex'rs, 203; Wills v. Spraggins, 3 Grattan, 568-9.

Under these rules, we affirm the decree of the probate court, in allowing the costs of the contest of the will, and in disallowing the item of \$2300, paid Edward Henry, jr., on compromise.

The item of attorneys' fees we would allow, if Mr. McPherson, the executor and proponent, had employed them. He, however, had nothing to do with it. They were employed by Mrs. Simmons, when she had no right to charge the estate. Not standing in any relation which made it either her legal or moral duty to establish the will, the expenses incurred by her to that end must be regarded as incurred for her personal emolument, and are only a personal charge on her.—Dietach's appeal, 2 Watts, 332. That item must be disallowed.

The matter of the receipt of Looney will probably not again be presented as it now is. The proof in the record is, perhaps, not full enough to exonerate the administratrix. The inventory is not before us, and we are not informed how she returned those notes to the probate

court. We deem it unnecessary to comment further on this item.

There is nothing in this record which enables us to determine that the witness-certificates, in the suit against Fluker, were not a proper charge against the estate. The costs incurred on them, after judgments were rendered, were incurred in her own wrong, as she had effects of the estate, and ought to have made payment.

Having disposed of all the questions raised by this record, we feel it our duty to remark, that some of the objections taken in this case betray a too rigid economy in the matter of allowances to administrators. They (administrators) fill a fiduciary relation which is indispensable in our judicial system; and in the absence of bad faith, the law does not visit them with severer intendments, than are indulged against agents generally.—See Gould v. Hayes, 19 Ala. 438.

Judgment of the probate court reversed, and cause remanded.

The principles we have announced dispose of the cross assignments of error, adversely to the party making those assignments. It results that there is no error in this record, prejudicial to Mrs. Simmons.

HATCHER'S ADM'R vs. CLIFTON.

[TROVER FOR CONVERSION OF SLAVES.]

1. *Validity of order of sale of personalty by probate court.*—An order for the sale of slaves belonging to a decedent's estate, granted by the probate court on the application of the administrator, which application shows on its face that a sale was necessary for the purpose of paying the debts of the estate, is valid.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by William H. Hatcher, as the administrator *de bonis non* of James E. Hatcher, deceased, against Allen Clifton, to recover damages for an alleged conversion of several slaves, which the defendant purchased at a public sale made by Robert S. Hatcher, the administrator in chief of said estate, under an order of the orphans' court, which, as set out in the bill of exceptions, was as follows:

"Regular Orphans' Court, February term, 1848.

<p>"Robert S. Hatcher, adm'r, <i>vs.</i> Heirs of James E. Hatcher.</p>	}	<p>Petition to sell slaves. This day came Robert S. Hatcher, administrator of the estate of James E. Hatcher, deceased, and files his petition for a sale of the slaves belonging to said decedent's estate; which said petition is ordered by the court to be filed and recorded, and is in the words and figures following: 'Your petitioner, Robert S. Hatcher, respectfully shows, that, by appointment of your honorable court, [he is] the administrator of all and singular the goods and chattels, rights and credits, which were of Jas. E. Hatcher, deceased; that said intestate departed this life, owning and being seized of no real estate,—his estate consisting of seventeen negroes, with but little other effects; that said intestate was largely in debt at the time of his death, some of which indebtedness was in judgments, and executions thereon issued, and in the hands of the sheriff of said county, and levied before the death of said intestate; that under said executions six of said negroes were sold by the sheriff, leaving only eleven in number now belonging to said estate; that there are large and pressing debts against said estate still unpaid, and sufficient, as your petitioner is advised, to consume the whole estate; that said intestate, at the time of his death, left two children only, Henry and James Hatcher, his only legal heirs, infants under fourteen years of age; and that said intestate's wife departed this life before him. Petitioner prays your honorable court to make an appointment of guardian <i>ad litem</i> for said minors; and that, upon final hearing, your Honor would grant an order to sell said negroes, on a credit until the 1st January, 1849; and for such other</p>
---	---	---

and further orders as may be deemed necessary.' (The affidavit of the administrator, annexed to the petition, is then copied into the order.) "Whereupon it is ordered by the court, that Thomas G. Rainer, of Cahaba, be appointed guardian *ad litem* to defend herein for said minors; which appointment said Rainer accepts, and is received by the court to defend herein for the said minors. And the said Rainer, guardian *ad litem* as aforesaid, comes now into court, and consents that said petition may be heard at this term of the court; but denies all and singular the allegations set forth in said petition, and calls for strict proof of the same. And it appearing from the proof advanced that the facts set forth in said petition are true, it is therefore ordered by the court, that the said administrator have leave to sell said slaves named in said petition, on giving notice of the time and place of said sale, at three or more public places in Dallas county, according to law; and that he make due return of the account of such sale to this court, within the time prescribed by law."

The court charged the jury, "that said order of the orphans' court was valid, and authorized the sale of said slaves by the administrator;" to which charge the plaintiff excepted, and which he now assigns as error.

GEO. W. GAYLE, for the appellant.

E. W. PETTUS, *contra*.

RICE, C. J.—The charge of the court below is correct. The order of the orphans' court, therein referred to, is clearly valid; because it was made, not only on the application of the administrator, but on an application which, upon its face, shows a necessity for the sale of the slaves for the lawful purpose of paying the debts of the estate. Upon such an application by the administrator, the jurisdiction of the orphans' court attached; and even if there was error in the exercise of that jurisdiction, the order of the court, when assailed *collaterally*, as here, could not be held invalid on account of the existence of such error.

Lewis' Adm'r v. Lindsay's Adm'r.

Ikelheimer v. Chapman's Adm'rs, 32 Ala. 676; Wyatt v. Rambo, 29 Ala. 510; King v. Kent, 29 Ala. 542.

Judgment affirmed.

STONE, J.—I agree with the majority of the court in affirming the judgment, but do not assent to the reasoning on which my brothers rest their opinion.—See Ikelheimer v. Chapman's Adm'rs, 32 Ala. 676.

LEWIS' ADM'R vs. LINDSAY'S ADM'R.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Limitation of appeal.*—The act of February 15, 1854, (Session Acts 1853-4, p. 71,) "to modify the operation of the statute of limitations," in its application to "causes of action" accruing prior to the 17th January, 1853, embraces appeals. (Overruling Green v. Maclin, 29 Ala. 695.)

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. JOHN E. MOORE.

THIS case originated in the probate court, and was carried by writ of error to the circuit court. The material facts are these: Prior to 1843, Hickman Lewis was appointed, by the orphans' court of Limestone, administrator of the estate of William Lindsay, deceased, but died without having made a final settlement of his administration. Letters of administration on the estate of said Lewis were duly granted by said orphans' court to John T. Menifee, who, on the 9th December, 1843, made a final settlement with said court of his intestate's administration on the estate of said Lindsay. All the persons interested in said estate were parties to this settlement, except the personal representative of William Lindsay, jr., deceased, an infant son of said decedent, who died a short time after his father. On the 2d December, 1850, letters of administration on the estate of said William

Lindsay, jr., were granted by the probate court of the county to A. L. McKinney, who, in December, 1851, having been made a party to said settlement on petition, sued out a writ of error to the circuit court to reverse the said decree. On the errors assigned in the circuit court, that court rendered its judgment on the 12th March, 1852, reversing the decree of the orphans' court of 1843, and remanding the cause to that court. From this judgment of the circuit court the present appeal was sued out on the 25th May, 1858. The appellee's counsel submitted a motion to dismiss the appeal, on the ground that it was barred by the statute of limitations.

ROBINSON & JONES, for the motion.

WALKER & BRICKELL, *contra*.

WALKER, J.—It was said, in an opinion of one member of the court, in *Green v. Maclin*, 29 Ala. 695, that the act of 15th February, 1854, (Pamphlet Acts, 71,) did not apply to appeals. The two members of the court who did not sit in that case, differ in opinion from the judge who made that decision. The majority of the court think error in the proceedings of the court below a "cause of action" within the meaning of that act. *Mazange v. Slocum & Henderson*, 23 Ala. 668; *Cox v. Whitfield*, 18 Ala. 738. The appeal in this case was sued out more than four years after the adoption of that act, and is certainly barred by it.—See *Mason & Chambers v. Moore & Tulane*, 12 Ala. 578.

The appeal is dismissed, at the costs of the appellant.

WEST vs. GALLOWAY'S ADM'R.

[MOTION TO AMEND JUDGMENT NUNC PRO TUNC.]

1. *Admissibility of parol evidence.*—On motion to amend a judgment *nunc pro tunc*, parol evidence is not admissible to prove facts not shown by the record.
2. *Sufficiency of evidence to authorize amendment.*—An entry “on the minutes kept by the presiding judge,” in these words, “Service proved, and judgment,” is sufficient to authorize an amendment of the judgment at the next term, *nunc pro tunc*, so as to show that proof of the service of the writ was made to the court.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by Grandison Galloway, as the administrator of Nancy Galloway, deceased, against Hugh R. West, and John P. West. At the return term of the writ, a judgment by default was rendered against both the defendants. At the next term, held in March, 1858, the plaintiff moved the court to amend this judgment *nunc pro tunc*, as of the preceding term, “so as to set forth in said judgment entry that the service of the summons and complaint upon the defendants was proved to the satisfaction of the court upon the trial of said cause.” On the trial of this motion, as the bill of exceptions states, “the plaintiff introduced the minutes kept by the presiding judge at said term of the court, and showed the following entry thereon by said judge: ‘Service proved, and judgment.’ The defendants then introduced as a witness, against the plaintiff’s objection, one C. G. Samuel, who testified, that he was the attorney who issued the summons and complaint in the case, and handed the same for execution to D. W. Prentice, deputy sheriff; that John P. West accepted service of said summons in his presence; that Prentice, at the request of said John P. West, then signed the name of the other defendant to said acceptance; that Hugh R. West was not then present; and that this was the only service proved before the court at the last term. This being all the evidence, the court

directed that the judgment might be amended with the same words as appeared on the judge's docket, but no further; to which ruling of the court said Hugh R. West excepted," and which he now assigns as error.

S. LEIPER, for the appellant.

JNO. T. MORGAN, *contra*.

STONE, J.—In considering the motion to enter judgment *nunc pro tunc*, the primary court should have regarded only the record evidence.—Thompson v. Miller, 2 Stew. 470.

The evidence adduced was *record* evidence, and it authorized the correction of the judgment *nunc pro nunc*. Thompson v. Miller, *supra*; Brown v. Bartlett, 2 Ala. 29; Spence v. Rutledge, 11 Ala. 590.

The judgment being regular, and that judgment relating back to the time it was first rendered, it must be affirmed.

PATTON vs. HAMNER.

[DETINUE FOR SLAVES.]

1. *Plea of former recovery*.—In detinue, a plea of former recovery in a statutory claim suit, averring that plaintiff has not acquired any title since the rendition of that judgment and verdict, is a bar to the action.
2. *Judgment not merged in forfeited claim bond*.—The forfeiture of a claim bond does not operate as merger or satisfaction of the original judgment, nor does it deprive the plaintiff of the right to sue out an *alias* or *pluries* execution.
3. *Validity of execution and levy thereof*.—An agreement between the parties to a pending claim suit, to the effect that a judgment of condemnation should be rendered for the plaintiff in execution, for a sum less than the real value of the slave in controversy, and that the title to the slave should vest in the claimant on payment of this agreed value within a reasonable time, does not render void an execution afterwards issued on the judgment of condemnation; nor does it affect the authority of the sheriff to levy on and sell the slave under the execution, notwithstanding a tender of the agreed value by the claimant.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Louisa Patton, against George M. Hamner, to recover a slave named Sarah, and was commenced on the 23d August, 1852. The case was before this court at its January term, 1856, when the judgment of the circuit court was reversed, and the cause remanded.—See 28 Ala. 618. The defendant's second plea, as set out in the present record, is as follows:

“*Actio non*, because he says that heretofore, in the probate court of Wilcox county, at a special term thereof, to-wit, on the 5th day of March, 1850, one Benjamin Patton, who had been and was guardian of the persons and property of two minor wards, to-wit, Josiah J. Stewart and William C. Stewart, came and was brought to a final settlement of his said guardianship; and, on such final settlement, two several judgments and decrees were rendered against him as such guardian; one, in favor of William C. Stewart, for \$1,690 70; and one in favor of Josiah J. Stewart, for \$1,690 70. And said defendant further avers, that afterwards, to-wit, on ———, executions of *fieri facias* were duly issued on said decrees, and were placed in the hands of George M. Hamner, who was then the sheriff of Wilcox county, and who afterwards, to-wit, on the 12th September, 1850, while said executions were of force, levied said executions on the said slave Sarah, as the property of the said Benjamin Patton; that the said Louisa Patton, the plaintiff in this suit, afterwards, on, to-wit, ——— made affidavits, and interposed claims to said slave under the statute, and a trial of the right of the slave was had; that afterwards, in the circuit court of Wilcox county, at the spring term thereof, 1851, said issues and the trial of the right of property came up for trial,—one between said W. C. Stewart, as plaintiff in execution, and Louisa Patton, as claimant; and the other between Josiah J. Stewart, as plaintiff, and Louisa Patton, as claimant—and by the consideration and judgment of said court, in each of said cases, it was then and there considered and adjudged by the court, that said slave was

subject to each of said executions. And the defendant further avers, that the said plaintiff has not, since the interposition of her said claim, nor since the trial aforesaid, acquired any title whatever to the said slave; that afterwards, on the 9th August and 9th September, 1851, *alias* executions were issued on said decrees of the probate court, and placed in the hands of said George M. Hamner, so being sheriff as aforesaid, who afterwards, on the 12th September, 1851, while said executions were of force, seized and levied on said slave, under and by virtue of said executions; that afterwards, on the 6th October, 1851, having duly advertised said slave, said sheriff proceeded to sell her, before the court-house door in Wilcox county, to the highest bidder, and one Calvin C. Sellers became the purchaser, at and for the price of \$600; that afterwards, on the 7th October, 1851, before the commencement of this suit, said Sellers sold and delivered said slave to the defendant, George M. Hamner, (of all which the plaintiff then and there had notice;) that said slave was in the possession of said Hamner, from the time of said sale, up to the commencement of this suit; and that plaintiff has not, since the interposition of her said claim to said slave, and the trial of the right of property in and to said slave as aforesaid, acquired any title to said slave. And this the defendant is ready to verify."

To this plea the plaintiff filed six replications, "in short by consent," as follows:

1. "*Precludi non*, because she says, that she admits every thing in said plea to be true, except that there was a trial of the right of property by a judge, as set out in said plea, and a condemnation of the slave sued for by a jury; and she avers, that the said judgment entries of condemnation were made without the intervention of a jury, and on the following agreement with said plaintiffs in execution, with the consent of said defendant in execution, to-wit: that the slave sued for in this action should be valued at \$350, (the other slaves levied on being supposed sufficient to satisfy said executions,) and that a judgment of condemnation should go, and that the claim-

ant, (the plaintiff in this action,) upon the payment of said agreed value within a reasonable time, together with interest and costs of claim and condemnation, should have said slave as her own property. And plaintiff further avers, that within a reasonable time thereafter, to-wit, on or about the 20th September, 1851, she tendered said agreed sum, with interest thereon and the costs aforesaid up to the time of said tender, to the defendant, George M. Hamner, and to the plaintiffs in the original executions, *who* (?) then and there held said slave as sheriff of said county, and who then and there had notice of said agreement, and who then and there refused to receive said money, or to deliver said slave to her or her agent, but held and sold said slave under the execution aforesaid; that by virtue of said agreement, and of the tender and refusal aforesaid, said slave became and now is her property; and the amount so tendered she is willing and now offers to deposit in court."

2. "*Precludi non*, because she says, that said judgment entries of condemnation were, and now are, wholly void in law for fraud of said plaintiffs in execution, because they were procured under the agreement set out in the foregoing replication, with the consent of said defendant in execution, with an intention on their part at the time of procuring it, unknown to plaintiff, to violate and disregard the same; and that the sale under said executions is equally void with said judgments of condemnation; and that neither the said C. C. Sellers nor the defendant acquired any title to the said slave under the same, but she is now, and was at the commencement of this suit, the plaintiff's property. And this she is ready to verify."

3. "*Precludi non*, because she says that, under the agreement set out in her said first replication, within the reasonable time aforesaid, she tendered to the defendant, who was then the sheriff of said county, and then and there had notice of said agreement and consent of defendant in execution, and was holding said slave under said executions, the agreed amounts of the said judgments of condemnation, with the costs aforesaid, and interest up to

the time of tender, which said defendant refused to accept or receive; and that thereby the said agreement became and was then and there wholly rescinded, and said entries of condemnation canceled, and the title to said slave then and there vested in plaintiff. And this she is ready to verify."

4. "*Precludi non*, because she says that, after said judgment entries of condemnation [were rendered,] and while said Hamner, as sheriff as aforesaid, held said slaves under said executions, she tendered to him the agreed value of said slave, to-wit, the sum of \$350, with interest thereon up to the time of tender, and the costs of said claim and condemnation; which said moneys he, the said Hamner, refused to receive, but held and sold said slave under said executions, as shown by said second plea; and that at the time of said tender, and before said sale, the said Hamner had notice of the said judgment of condemnation, and the said agreed value of said slave. And this the plaintiff is ready to verify."

5. "*Precludi non*, because she says, that the said C. C. Sellers was the attorney-at-law of the said plaintiffs in execution, on the recovery of said judgments in the orphans' court, and in said claim suits, and, as such attorney, participated in making the said agreement stated in plaintiff's first replication; that after said judgment entries were made under said agreement, and after the adjournment of the court at which term they were made, and without any change of said agreement, said Sellers, as such attorney, caused and procured the said executions, under which said slave was sold as aforesaid, to be issued and levied as aforesaid; that on the day of the sale of said slave, and before said slave was sold, he was informed and knew that plaintiff had made the tender aforesaid, and did not, as he had the right and the power to do, request or instruct said defendant to receive the money tendered, nor stop the said sale, but became himself the purchaser of the slave at said sale, and afterwards sold said slave to defendant. And plaintiff avers, that thereby said Sellers acquired no title to said slave by his said purchase, as he was cognizant of and participated in the facts

stated in this replication; and that said Hamner, the defendant, acquired no title by his purchase from said Sellers; but that the title to said slave continued in plaintiff, and was in her at the commencement of this suit. And this she is ready to verify."

6. "*Precludi non*, because she says, that after the said judgment entries of condemnation [were rendered,] and within a reasonable time thereafter, she tendered to the attorney of the plaintiff in execution the agreed value of said slave, to-wit, the sum of \$350, with interest thereon up to the time of the tender, and the costs of said claim and condemnation; which moneys the said plaintiff refused to receive. And this she is ready to verify."

The defendant demurred, "in short by consent," to each of these replications; but the record does not show that any causes of demurrer were specified. The court sustained the demurrers, and the plaintiff was compelled to take a nonsuit; which she now moves to set aside, and assigns as error the sustaining of the demurrers to the several replications.

GEORGE W. GAYLE, for the appellant.

No counsel appeared for the appellee.

RICE, C. J.—The averment added to the second plea, after it was remanded, made the plea good.—Patton v. Hamner, 28 Ala. 618.

[2.] The claim bond, required by the statute, is intended to furnish an *additional* security to the creditor, and cannot be so construed as to work injury to him. Its forfeiture may give him rights, but cannot deprive him of the pre-existing right to sue out an *alias* or *pluries* execution on his original judgment. The doctrine, that on the forfeiture of such bond, the original judgment is merged or satisfied, or in any way impaired in its force or efficacy, does not obtain in this State.—Hopkins v. Land, 4 Ala. 427; Caperton v. Martin, 5 Ala. 217; Curry v. Bank, 13 Ala. 304; Bradford v. Dawson, 2 Ala. 203; Fryer v. Dennis, 2 Ala. 144; Kemp v. Porter, 7 Ala. 138; Langdon v. Brumby, 7 Ala. 53.

[3.] Although the replications have been somewhat changed since the case was formerly here, yet they are still bad under the law as laid down in the former opinion. "Admitting the truth of *every fact* stated in any of them, the executions, under which the sheriff sold the slave in controversy, were not void, and he had authority to make the sale under them. He was not bound to recognize any right asserted by the appellant under the agreement mentioned in the replications," nor to constitute himself a judge, to determine the questions of conflicting rights and interests which arose out of that agreement; nor to disobey the mandate of the executions, because of a tender, which depended for its efficacy entirely upon the validity and effect of the alleged agreement.—See *Patton v. Hamner*, *supra*, and authorities there cited.

There is no error, and the judgment is affirmed.

STONE, J., not sitting.

WYATT'S ADM'R vs. SCOTT.

[TROVER FOR CONVERSION OF SLAVE.]

1. *Presumption from lapse of time.*—In an action brought by an administrator *de bonis non*, against one claiming under a purchase at a public sale by the administrator in chief, the regularity of the sale, and of the order under which it was made, may be presumed from the lapse of twenty years, accompanied with proof of adverse possession under the sale for that length of time, and of the fact that the records of the court were loosely kept about the time when the order of sale was made.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Thomas M. Williams, as the administrator *de bonis non* of Peter Wyatt, deceased, against James J. Scott, to recover damages for the alleged

conversion of a slave named Elbert; and was commenced on the 10th October, 1857. The defendant pleaded, "in short by consent, not guilty, and *ne unques administrator*;" and issue was joined on these pleas. The cause was tried on an agreed statement of facts, as follows:

"Elbert, the slave in controversy, belonged to Peter Wyatt, deceased, at the time of his death. On the 4th November, 1833, letters of administration on the estate of said Wyatt were granted by the orphans' court of Lowndes county, where he died, to Mrs. Mary A. E. Wyatt and William N. Mock. Mrs. Wyatt continued in said administration up to March, 1852, and Mock continued until his death in 1845. On the same day said letters of administration were granted, the judge of said orphans' court made the following orders:

"Ordered by the court, that the administrators of the estate of Peter Wyatt, deceased, have leave to sell all the perishable property of said deceased, upon a credit of at least six months.' 'Ordered by the court, that the administrators do make a full and true inventory of said sale, and return the same to this court to the first term thereafter.' 'Ordered by the court, that the administrators give a notice of said sale, by advertisement at three or more public places in said county, at least thirty days previous thereto, of the time and place of said sale.' 'Ordered by the court, that the administrators of the estate of Peter Wyatt, deceased, have leave to sell his present crop of cotton, at public or private sale, as they may deem most advantageous to said estate.'

"In February, 1834, after having duly advertised the sale of the personal property of said estate, under the above orders, the administrators proceeded to sell, at the late residence of the deceased, to the highest bidder, at public sale, all the personal property belonging to said estate, including among the slaves the boy now in controversy. There were a great many persons present, and the property brought full prices. The property was sold on a credit until the 1st January, 1835; and the terms of sale were proclaimed when the property was put up. The slave in controversy, who had been appraised at \$250,

was bid off by Benjamin Mock, a brother of the administrator, for \$336 50. In March, 1834, the administrators made and returned to said orphans' court a sworn sale-bill of all said personal property, including all the slaves and cotton, the prices at which the various articles were sold, and the names of the respective purchasers; and thereupon, at the same term of the court, the following orders were made by said court, and entered on its minutes: 'Now, at this term of the court, William N. Mock, one of the administrators of Peter Wyatt, deceased, came into court, and made return of a sale-bill of the property of said deceased; whereupon it is ordered by the court, that the clerk enter the sale-bill upon record, in the inventory book kept for that purpose; and it is further ordered, that the clerk file the original sale-bill in his office as an office-account.'

"Shortly after said sale, the slave in controversy went into the possession of said Benjamin Mock, who complied with the terms of said sale, and paid the purchase-money, and lived in said county eight or ten years afterwards. Said slave was subsequently sold by Mock to one Moorer, and, after passing through the hands of several persons, was finally purchased by the defendant on the 27th February, 1851, who paid full value for him. The purchase by Mock, and all the intermediate sales from him to the defendant, were for valuable consideration, without notice of any adverse claim. Said Mock, and all who held said slave under him, had notorious, uninterrupted, and exclusive possession of said slave, claiming to own him, from the time of said purchase by Mock. The defendant went into possession of said slave about the — day of —, 1853. The said slave was worth, at the time of the conversion, which was two years before October, 1857, about \$800."

A transcript from the records of the probate court of Lowndes was also read in evidence, by consent, "as evidence of the matters therein set forth." This transcript contained, 1st, the petition of William B. Wyatt, a son of said Peter Wyatt, deceased, which was filed on the 8th March, 1852, asking the revocation of the letters of

administration formerly granted to Mrs. Wyatt, and the grant of letters of administration *de bonis non* to Thomas M. Williams; and 2d, the decree of the court, granting the prayer of the petition, revoking Mrs. Wyatt's letters, and granting letters *de bonis non* to said Williams. This petition alleged, that William M. Mock had removed from the State and died; that Mrs. Wyatt had married one Thomas D. Armstrong, and removed with him to Louisiana; and that no final settlement of their administration had been made. The decree of the court recited, that these facts were proved; and further, that Mrs. Armstrong's written resignation, signed only by her, "had been presented to the court."

"It was admitted, also, that said transcript contains a recital of all the facts which transpired in relation to the subject-matter of said orders; and further, that the probate judge of Lowndes county will prove, that no notice was ever given by said court, either to William N. Mock, Mrs. Wyatt, or Thomas D. Armstrong, before the making of the order revoking their letters, requiring them to make a settlement of said estate. It was agreed, also, that the court might decide upon the competency of this evidence of the probate judge, reserving to either party the right of exception; and if decided to be competent by the court, the fact shall be considered as proved before the jury."

"There was evidence, also, tending to show that, during the years 1832, 1833, 1834, and 1835, the judge and clerk of the orphans' court of Lowndes were careless and negligent in the discharge of their official duties; and that the records and papers of said court, during that period, were very loosely kept."

"This being all the evidence in the cause, the court charged the jury, that if they believed the evidence, they might, after this lapse of time, presume from the evidence that the sale of the slave in controversy by the administrators in chief, and the order under which it was made, were regular;" to which charge the plaintiff excepted, and which he now assigns as error.

THOMAS WILLIAMS, and JOHN D. F. WILLIAMS, for the appellant.

BAINE & NESMITH, *contra*.

WALKER, J.—The decisions of this court, in the cases of McArthur v. Carrie's Adm'r, 32 Ala. 75; Milton v. Haden, 32 Ala. 30; Lawson v. Lay, 23 Ala. 377; and Gantt v. Phillips, 23 Ala. 275, are conclusive in favor of the correctness of the charge given by the circuit court; and on the authority of those decisions, the judgment of the court below is affirmed.

STONE, J., not sitting.

ARMOUR vs. LOSE.

[BILL IN EQUITY FOR REFORMATION OF DEED, AND SETTLEMENT OF PARTNERSHIP.]

1. *Equitable relief against mistake or fraud in obtaining conveyance*.—If a purchaser of an undivided half interest in a tract of land, by mistake or fraud, and without the knowledge or consent of his vendor, obtains a conveyance of the absolute property, a court of equity will direct a re-conveyance to the vendor of an undivided half interest.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Jacob Lose, against Samuel Armour, and alleged, that the complainant, in December, 1846, owned a tract of land, near the city of Mobile, containing about thirty-five acres; that Samuel Armour, his father-in-law, proposed that their families should live together on this land, and jointly cultivate a garden for market purposes, and that complainant should let him have an undivided half interest in the land; that complainant accepted this proposition, and agreed to sell said Armour an undivided half interest in the land for

\$1,500, (that being one half the price paid by him for the land,) and authorized Armour to have a conveyance prepared accordingly; that Armour procured a deed to be prepared, which, through mistake or fraud, conveyed to him the entire interest in the land, and which the complainant executed under the supposition that it conveyed only an undivided half interest; that they jointly lived on the land and cultivated it until some time in 1849, when the complainant went to California, leaving Armour to carry on the business of the garden on their joint account; and that on his return from California, "within a year or two prior" to the filing of the bill, he learned for the first time that Armour claimed the entire interest in the land, and repudiated their partnership agreement. The prayer of the bill was, that Armour might be decreed to re-convey to the complainant a half interest in the land, that a lien might be declared on the other half for the unpaid balance of the purchase-money due from Armour; that the partnership accounts might be settled, and for other and further relief.

The defendant answered the bill, and denied all its material allegations. He alleged, that the land was bought by him and the complainant jointly, in 1844, under an agreement that they should jointly cultivate it and raise vegetables for market; that it was further agreed between them that the title should be taken in the name of the complainant alone, but the expenses of cultivation and the profits were to be equally divided between them; that he paid about \$1200 of the purchase-money, entered into the possession of the land, and spent about \$1000 in improvements on it; that their experiment in gardening proved a failure, and the profits did not pay the expenses; that the complainant's family in the meantime boarded with him, and the complainant became otherwise indebted to him; that in December, 1846, in consideration of this indebtedness, the complainant agreed to convey to him his interest in the land; that the deed was intentionally made to convey the entire interest, and the complainant knew when he executed it that it did convey the entire interest; that the defendant henceforward cultivated the

land solely on his own account, and that the complainant had no interest in it or the proceeds of the garden.

The complainant took the depositions of Charles Armour and John Pollard, both of whom testified to declarations of the defendant, made while he was occupying and cultivating the land, to the effect that he and the complainant were jointly interested, and that the complainant contributed liberally to the payment of the expenses; and the former further testified, that the complainant bought the land, paid the greater part of the purchase-money, and afterwards sold an interest to the defendant at its cost price, and that he never heard the defendant deny the complainant's interest until after the return of the latter from California. The defendant took the depositions of T. H. Oliver and William McKean. Oliver testified, that the complainant, a short time before he went to California, told him that he had sold his interest in the land to the defendant; but, on his return from California, still claimed an interest in the land, and said that the defendant had "tricked" him out of the title. McKean testified, that in April, 1851, he, as auctioneer, advertised the land for sale at the request of the complainant; that it was advertised as belonging to the defendant, and he understood that it was the defendant's property; that the complainant was anxious to accept an offer of \$2,500 for the land, but said that the title must come from Armour; and that Armour refused to sell for that price.

On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant; directing the defendant to execute to the complainant, within ten days, a conveyance of an undivided half interest in the land, and ordering a reference to the master of the matters of account; and his decree is now assigned as error.

JOHN HALL, for the appellant.

PERCY WALKER, *contra*.

STONE, J.—Neither the bill in this case, nor the answer, sets up that the deed from Lose and wife to

Armour, conveying the entire lot, was in trust. The bill alleges, that Armour, by mistake or fraud, procured the deed for the entire property, when it was the intention of Lose to convey only the undivided half. The answer denies this, and sets up a contract, by which Lose intended to convey, and did convey, the entire property in absolute right.

Under these circumstances, we consider the only question to be one of fact. Two witnesses and strong corroborating circumstances prove satisfactorily to our minds that Mr. Lose, the complainant, had a continuing interest in the lands in controversy. The declarations of Mr. Armour, and the conduct of the parties, leave but little if any room to doubt the nature of that interest. It was an interest in the freehold. The countervailing testimony is not sufficient to overturn this conclusion. We feel authorized, then, to find that, either by fraud or mistake, and without the knowledge or consent of Lose, Armour procured the deed for the entire property, when it should have been only for an undivided half. This leads us to the same conclusions which the chancellor attained.

The decree of the chancellor is affirmed.

MATTHEWS *vs.* ROBINSON.

[BILL IN EQUITY TO ENJOIN GARNISHMENT PROCEEDINGS.]

1. *What defenses garnishee may make.*—An agreement between the attaching creditor and the garnishee, by which the former undertook, for valuable consideration, to pay the debt due from the garnishee to the defendant in attachment, is not available to the garnishee as a defense in the garnishment suit.
2. *When garnishee may enjoin proceedings.*—A garnishee may come into equity, to enjoin proceedings against him by a non-resident plaintiff, on proof of an agreement between him and the plaintiff, founded on valuable consideration, by which the latter undertook to pay the debt due from the garnishee to the defendant.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Benjamin W. Matthews, against James Robinson, and alleged the following facts: On the 15th March, 1849, complainant sold and delivered to defendant a slave, in consideration that defendant would pay all the debts then owing by complainant. The exact amount of these debts was not then known to either party, but among them was a decree of the orphans' court of Wilcox, in favor of one Commander, which was particularly mentioned. This contract was made at the instance of the defendant, and the negro was delivered to him in pursuance to its terms, and a bill of sale executed to him. The defendant kept the negro until some time in 1854, and then sold him for \$1,600. "Shortly afterwards, the said defendant obtained the control and possession of certain demands against said Commander, to whom complainant was indebted, as aforesaid, by decrees rendered in the orphans' court of Wilcox, to-wit, in 1847 or 1848, for \$308, the whole amount of which was unpaid at the date of said contract, except \$111 45, paid by complainant to one George Teat, who had obtained a judgment against complainant, as the administrator of said Commander, in the circuit court of Wilcox county, on the 29th May, 1848, as a garnishee debtor of said Commander; from which said demands attachments from a justice's court had issued against said Commander, as a resident debtor; in which said attachment suits said Robinson caused complainant to be summoned by garnishment, as the debtor of said Commander, upon the understanding and agreement between them, (to-wit, between said Robinson and complainant,) before judgment was rendered against complainant as garnishee, that complainant should allow judgments to be rendered against him, so that Robinson might not be compelled to pay the entire decree which Commander had previously obtained against complainant, but might retain a part of the amount in his own hands; and complainant accordingly answered, admitting an indebtedness, and judg-

ments were thereupon rendered against him in the several cases."

In violation of this contract and understanding, Robinson immediately sued out executions on these judgments, and had them levied on the complainant's property. The complainant endeavored, both in the justice's court, and afterwards in the circuit court, to have these executions superseded, and satisfaction of the judgments entered, on the ground of payment; but, in consequence of opposition from Robinson, failed before both tribunals. He then removed the cases, by *certiorari*, into the circuit court, and there filed new answers, setting up the contract and understanding above detailed. The answers were contested by Robinson, and issues were thereupon made up between them, which stood for trial at the approaching term of the circuit court when the bill was filed.

In addition to the demands above mentioned, upon which judgments were obtained against complainant as garnishee, Robinson purchased another claim against Commander, in favor of one Henry Waite, as surviving partner of Waite & McReynolds; sued out an attachment thereon, on the 25th September, 1852, returnable to the then next term of the circuit court of Wilcox; and summoned the complainant, by process of garnishment, as the debtor of Commander. The complainant appeared, and filed an answer, in which he stated all the facts above set out. This answer also was contested by Robinson, and an issue being thereupon made between them, the cause stood for trial at the next term of the circuit court after the filing of the bill. Robinson was a non-resident, and supposed to reside in Texas.

The prayer of the bill was, "that said agreement between complainant and said Robinson, in relation to the purchase and sale of said slave, may be carried out in good faith by the said Robinson, according to its true intent and spirit; that complainant may be reimbursed the moneys expended by him in the defense of said garnishment proceedings; that said Robinson and all others may be enjoined from further prosecuting said suits

against him;" and the prayer for general relief was added.

The chancellor dismissed the bill for want of equity, "because it appears that the matter complained of is in litigation in another court, which has jurisdiction to afford as plain, adequate and complete a remedy as the chancery court could give;" and his decree is now assigned as error.

D. W. BAINE, with whom were J. J. ROACH, F. K. BECK, and JOHN COCHRAN, for the appellant.—The only question in the cause is, whether the garnishee may set up against the attaching creditor, in the garnishment proceeding, a set-off or defense peculiar to the attaching creditor, and with which the defendant in attachment has no privity. It is evident that Robinson, the attaching creditor, succeeds in the garnishment suit to all the rights which Commander, the defendant in attachment, has against Matthews, the garnishee.—*McGehee v. Walke*, 15 Ala. 183; *Harrell v. Whitman*, 19 Ala. 135; *Wyatt v. Lockhart*, 9 Ala. 91. It is equally evident that, if Commander had been suing Matthews, Robinson's promise to pay the debt would have been no defense, because Commander was no party to the contract; he would have had the right to proceed to judgment, entirely unaffected by the agreement. In the garnishment suit, Robinson is proceeding against the garnishee, not in his own right, but in right of Commander; consequently, he can recover a judgment wherever Commander could, unaffected by a defense personal to himself.

2. A garnishment is a special, statutory proceeding, unknown to the common law, and must be prosecuted in the mode pointed out by the statute. The Code (§ 2541) provides, that if the garnishee admit an indebtedness to the defendant, "judgment thereon must be rendered against him." In this case, the garnishee was compelled to admit an indebtedness to the defendant. When he did that, the court could act in but one way—that is, by rendering judgment against him. The statute makes no provision for the trial of a set-off or defense against the

plaintiff. No power is given to make up such an issue, or to empanel a jury to try it. The single purpose of the statute is, to subject the debts of the defendant in attachment, to satisfy the claim of the attaching creditor; and when this is done, its force is exhausted. It is not adapted to the trial of equities, or matters of defense and set-off, between the plaintiff and the garnishee alone. A garnishment is not in the nature of an equitable proceeding, but is a legal remedy.—Representatives of Thomas v. Hopper, 5 Ala. 442.

3. The judgment against the garnishee is his protection against the defendant. So long as that judgment depends on the question of indebtedness to the defendant *vel non*, it becomes conclusive of the amount of the garnishee's indebtedness to the defendant, from which he is discharged. If the question were complicated by side issues between the plaintiff and the garnishee, it would be difficult to show, without parol evidence, the amount which the garnishee discharged of his debt to the defendant. No arrangement, or compromise, between the plaintiff in attachment and the garnishee, can discharge the latter from his original debt. Nothing but a judgment for the amount of his debt, with full satisfaction, can discharge him.—Brown v. Somerville, 8 Md. 444.

4. Again, if the garnishee held a set-off against the plaintiff, greater than the amount of the plaintiff's debt, he would be entitled to a judgment for this balance, with costs. This would be wrong, because the plaintiff does not, by suing out the garnishment, invite a trial of equities, or a comparison of claims, between him and the garnishee, as in an ordinary suit: he simply seeks, by a legal remedy, to reach the debts of the defendant.

5. The right of set-off is purely a statutory right. Before the statute was adopted, a court of equity alone had jurisdiction of a set-off. The statute does not apply to proceedings purely statutory, but only to suits between parties at common law.—White v. Governor, 18 Ala. 768.

6. The right of set-off exists, at law, where the debts between the parties are mutual. In this case, there was no mutuality in the debts: the garnishee owed, not the

plaintiff, but the defendant in attachment; while the plaintiff, not the defendant, owed him.

7. The above argument is an answer to the position, that the garnishee had a remedy against the plaintiff for the breach of contract, which, under the Code, he might set off in the garnishment suit. But it may be said, that the plaintiff's agreement to pay this debt would operate as a payment of it when he subjected it to his demand. Conceding, for the sake of argument, that if a party promises the maker of a note to pay it, and afterwards acquires the note, it will be treated as paid; still the case at bar cannot be brought within the principle. The rule only applies, in any case, on the ground that, the party having promised to pay the note, his subsequent purchase of it is presumed to be under his promise to pay it, and is therefore treated as a payment. But this presumption may be rebutted. If the party, after making such promise, should repudiate it, and purchase the note with the avowed purpose of collecting it from the maker, no such presumption would arise. In such a case, the maker could only rely on his cause of action for a breach of the agreement: there would be no payment. Again, it could not be contended that the debt would be treated as paid, until it was acquired by the party promising to pay it. In this case, the plaintiff does not acquire the debt, or obtain the control over it, until he obtains a judgment against the garnishee; and the garnishee does not become discharged from his debt, until he pays the judgment. If the defense of the garnishee is to profit him anything at law, he must make it before judgment against him; and yet it is not until after judgment against him that his defense accrues, because the plaintiff does not until then acquire the debt, and there can be no payment until he acquires it. Again, the same objection arises to setting up the payment to the plaintiff as would arise in a case of set-off; the garnishment proceeding is not adapted to the trial of such a question.

8. The garnishee, then, has a defense and set-off against the plaintiff, which he cannot make available in the pend-

ing proceeding at law. That defense and set-off are grounded on the plaintiff's agreement to pay the very debt which he is trying to enforce against the garnishee in the pending proceeding at law, and which he will enforce in that proceeding unless prevented by the interposition of the court of chancery; and Robinson, who, in violation of his agreement, is attempting to perpetrate this injustice upon the garnishee through the instrumentality of the garnishment proceeding, is a non-resident. In such a case, there can be no doubt of the jurisdiction of the chancery court to interfere for the protection and relief of the garnishee.—*French v. Garner*, 7 Porter, 554; *Graves v. White & Hull*, 27 Miss. 423.

WATTS, JUDGE & JACKSON, *contra*.—If the facts stated in the bill are not true, the garnishee is not entitled to relief in any court. If they are true, he can obtain full relief on the trial of the pending garnishment proceedings, or, at any rate, in an action at law for damages on account of the breach of contract. The bill does not aver that Robinson is insolvent, or unable to respond in damages; nor does it show any other special circumstances to give a court of equity jurisdiction.

RICE, C. J.—The chancellor supposed that the complainant showed in his bill that he had “as plain, adequate, and complete remedy” at law as in chancery; and upon that supposition, the chancellor dismissed the bill for want of equity; or, in other words, for matter apparent on the face of the bill.

The bill makes a clear case for the complainant. This is so fully established by the argument of the counsel for the complainant filed in this court, as to render it unnecessary for us to do more than refer to that argument.

The decree of the chancellor is reversed, and the cause remanded. The appellee must pay the costs of the appeal.

BLACK vs. STONE & CO.

[BILL IN EQUITY TO ENJOIN JUDGMENT AT LAW.]

1. *Registration of assignment of patent-right.*—The registration of an assignment of a patent-right, under the acts of congress, is only necessary by way of notice to subsequent purchasers from the assignors: as between the parties and strangers, the failure to record the assignment does not affect its validity.
2. *Equitable relief against mistake.*—A purchaser, who, through mistake, has received from the vendor a blank piece of paper instead of a deed, cannot obtain relief in equity against the mistake, without showing that, on the discovery of the mistake, he applied to his vendor for a correction of it, or averring a sufficient excuse for his failure to do so.
3. *Jurisdiction of equity where legal remedy is adequate and perfect.*—The assignee of a patent-right, to whom a blank piece of paper instead of a deed of assignment was delivered by mistake, and who has sustained injury in consequence of his inability to obtain legal redress for infringements of the patent, has a complete remedy at law against his vendor, and, therefore, cannot come into equity, without alleging insolvency or some other ground of equitable interposition.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the appellants, and sought to enjoin two judgments at law which had been obtained against them by the defendants. The facts on which the complainants asked relief, as stated in their bill, were these: In June and August, 1847, the complainants purchased from one Parish, who was the agent of the defendants, the exclusive right to make, use and sell, within the limits of Tallapoosa county, and throughout the region of country covered by the waters of Buck creek, "the premium vertical water-wheel, as patented to Gideon Hotchkiss and Timothy Rose;" and executed their two notes for the purchase-money, one due on the 18th December, 1847, and the other on the 1st January, 1848. At the time these two contracts were made, Parish represented to the complainants that his principals had a valid deed of assignment for the patent-right, duly registered in the patent-office at Washington, and delivered to

them papers which, without examining, they received as valid conveyances of the interest in the patent which they had purchased. On the 14th October, 1848, suit was commenced against complainants on their said notes, and they suffered judgment by default to be rendered against them at the ensuing term of the circuit court; not having then discovered that the consideration of said notes had failed. Afterwards, on learning that one Culberson was selling and using the patent within the limits of Tallapoosa county, without authority from them, the complainants commenced an action at law against him, for an infringement of their rights; but, about the time the cause was ready for trial, they discovered for the first time that Parish, through fraud or mistake, had delivered to them only a blank piece of paper, instead of a deed of assignment of the patent-right for the county; and they were consequently obliged to dismiss their suit. At the same time, they discovered that the other deed, which they had supposed conveyed the patent-right for the country covered by the waters of Buck creek, only conveyed the right to use one pair of wheels on said creek; and this, they charged, was the result of fraud or mistake on the part of said Parish. Afterwards, they caused an examination to be made in the patent-office at Washington, for the deed of assignment which, according to the representations of Parish, conveyed to the defendants the right to sell and transfer the said patent-right; but no deed of assignment could be found; consequently, they charged, their purchase of said patent-right, independent of said fraud or mistake on the part of Parish, was null and void, because the defendants had no right to sell or transfer it, and complainants could not recover damages for any infringement of their rights. The prayer of the bill was for an injunction of the judgments on the notes, and for general relief.

The chancellor dismissed the bill, on motion, for want of equity; and his decree is now assigned as error.

GEORGE W. GUNN, and LEFTWICH, for the appellants.

WM. P. & T. G. CHILTON, *contra*.

WALKER, J.—The failure to record in the patent-office the assignment to the complainants' vendors did not affect its validity as between the parties and strangers, and such recording was only necessary by way of notice to purchasers from the assignor.—Case v. Redfield & Puett, 4 McLean, 526; Brooks v. Bryan, 2 Story, 525; Boyd v. McAlpin, 3 McLean, 427.

[2.] When the bill says that a blank piece of paper, instead of an assignment, was given by *fraud* or *mistake*, we must adopt the alternative less favorable to the pleaders. We therefore regard the bill as averring, that the blank piece of paper was delivered by mistake. When this mistake was discovered by the complainants, they should, in the absence of any excuse for the omission, have called upon the vendors for a correction of the mistake. The bill avers neither a request for the correction of the mistake, nor any reason for its omission. The bill, therefore, contains no equity on the ground of that mistake.—Long v. Brown, 4 Ala. 622; Pierce v. Brassfield, 9 Ala. 573; Evans v. Bolling, 5 Ala. 550; Beck v. Simmons & Kornegay, 7 Ala. 71.

The failure to make the transfer of the right to use the patent on the waters of Buck creek as extensive as the contract, was the result of mistake. This imparts no equity to the bill, for the reasons already stated in reference to the other alleged mistake.

[3.] It was the complainants' own folly to commence a suit for the infringement of the patent, without the evidence of an assignment. If they have sustained damage in consequence of their not having the assignment, and therefore not being able to obtain redress for an infringement of the patent, since the judgment was rendered against them, it affords no ground for a resort to chancery, unless insolvency or some other ground of equity had been alleged. The remedy of the complainants is at law.

The decree of the court below is affirmed.

STONE, J., not sitting.

THORPE *vs.* SUGHI.

[ACTION TO RECOVER RENT.]

1. *Admissibility of parol evidence to explain terms of written lease.*—In an action between landlord and tenant, parol evidence is not admissible, to show that the words, "the said house is to be furnished with gas," as used in the written lease, meant that the landlord should supply gas-fixtures, and not that he should pay for the gas consumed in the house.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by Edward R. Thorpe, against Mrs. Hannah Sughi, to recover \$150 for the rent of a dwelling-house in the city of Mobile, from the 1st November, 1856, to the 1st February, 1857. The defendant pleaded, "in short by consent," the general issue, payment, tender, and set-off; and issue was joined on all these pleas. It appeared on the trial, that the plaintiff had leased the house to the defendant, for one year from the 1st November, 1855, at an annual rent of \$600, payable quarterly. The lease contained a provision in these words: "The said house is to be furnished with gas, and painted all over to the satisfaction of Mrs. Sughi; and she has the privilege to retain the said house, at the same rent yearly, for as many years as she may wish." Mrs. Sughi paid the entire rent for the first year under this lease, "without having demanded anything from the plaintiff for gas;" and she continued to occupy the premises, after the expiration of the year, under the terms and stipulations of the lease.

"On the trial, the defendant pleaded a set-off to a portion of the plaintiff's claim, and a tender of the balance. The account consisted of a gas-bill for \$60 75, paid by the defendant for gas burned by her in the house from the time of her original renting up to the 1st February, 1857. The plaintiff objected to allowing this set-off,

because (1st) it was not the intention of the parties, at the time of the original renting, that the plaintiff should furnish the house with gas, but only with gas-fixtures; and because (2dly) the defendant not having demanded of the plaintiff any sum for gas during the first year of her tenancy, but having paid it herself, it would not be allowable for her to make any other defense to this action than she could have made if sued for the rent due for the first year. In support of the first ground of objection, the plaintiff offered one James Burns, who had been employed as the agent and manager of the gas-company in the city of Mobile, as a witness to prove that, between landlord and tenant, the term, 'to furnish the house with gas,' as used in a lease, without any word of explanation, was always understood, so far as he knew, to mean that the landlord was to introduce gas-fixtures only, and leave the tenant to make his own arrangements with the gas-company for a supply of gas; that for the last twenty years he had known words of this character to be used by landlords in leases, without its having ever been contended that they were liable for the gas itself. The defendant objected to each portion of this evidence, and the court sustained the objection; to which the plaintiff excepted."

"As circumstances to show that the parties did not intend that the plaintiff should furnish the house with gas, but only with gas-fixtures, the plaintiff offered to prove, that the premises in question, prior to the renting to the defendant, were rented for \$550 annually; that he added to the premises, before the defendant took possession under her lease, an additional piece of land, and four or five rooms, and painted the house inside and out, and placed an iron verandah in front of the house, and introduced gas-fixtures at a cost of \$170, and furnished the house with costly chandeliers. To all this evidence the defendant objected, and the court sustained the objection; whereupon the plaintiff again excepted."

The rulings of the court on the evidence are now assigned as error.

C. F. MOULTON, for the appellant.

F. S. BLOUNT, *contra*.

STONE, J.—On the authority of *Barlow v. Lambert*, 28 Ala. 704, and *Smith & Holt v. Mobile Navigation and Mutual Insurance Co.*, 30 Ala. 167, the judgment of the circuit court in this case is affirmed.

COOPER'S ADM'RS vs. TILLMAN'S ADM'R.

[ACTION AT LAW BY PERSONAL REPRESENTATIVE OF DECEASED ADMINISTRATOR
AGAINST ADMINISTRATOR DE BONIS NON.]

1. *Action does not lie by trustee against trust estate.*—The personal representative of a deceased administrator cannot maintain an action at law against a succeeding administrator *de bonis non* of the first intestate, to recover reimbursement for moneys paid out to an attorney-at-law on account of professional services rendered in and about the business of the administration, or to charge the estate with the payment of such services.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. S. D. HALE.

THIS action was brought by the administrators of George Tillman, deceased, against the administrators *de bonis non* of Campbell Cooper, deceased, to recover "two hundred dollars due by account, for money paid on the 1st March, 1855, on account for the benefit of the estate of said Cooper, with interest thereon." The defendants pleaded, "in short by consent, 1st, that this court has no jurisdiction of the case, but the matter in controversy should have been determined and settled in the probate court; 2d, *non assumpsit*; 3d, payment; 4th, set-off; and 5th, the statute of limitations." The plaintiffs moved to strike out the first plea, and took issue on the others; but the record does not show what the action of the court on the motion was. The facts of the case, as disclosed on the trial, are thus stated in the bill of exceptions.

“The plaintiffs’ intestate, George Tillman, was the former administrator of the defendants’ intestate, and, as such, contracted with Mess. Baker & Lewis, attorneys-at-law, to pay them \$75 for professional services to be by them rendered to him, as such administrator, from the time of the grant of letters to him up to his final return on said estate in the probate court; and said Baker & Lewis agreed, in consideration thereof, to render to him all such professional services as he might require in the probate court, as such administrator, up to said final return. Some days afterwards, Tillman applied to Baker, of the firm of Baker & Lewis, to attend the appraisement, and render such services as might be necessary. Baker gave him the necessary advice, and informed him that his presence at the appraisement would be useless and unnecessary. Tillman, however, insisted that he should go, and agreed, as such administrator, to pay him \$25 additional if he would go; which terms Baker accepted, and attended the appraisement. Soon after the appraisement, and before the sale of the property belonging to said Cooper’s estate, Tillman died, and the plaintiffs administered on his estate; and the defendants were afterwards appointed administrators *de bonis non* of Cooper’s estate. Baker & Lewis afterwards sued the plaintiffs, as administrators of Tillman, and recovered judgment against them for \$100, besides interest. This judgment was introduced as evidence by the plaintiffs, to prove that they had not paid said fees voluntarily; to which the defendants objected, and excepted to the overruling of their objection. It further appeared from the evidence, that Baker & Lewis, after Tillman’s death, tendered their professional services to the defendants; but that the defendants declined them, and retained other counsel.”

The court charged the jury, on this evidence, that if they found that Tillman, as administrator of Cooper, contracted with Baker & Lewis to pay them \$75 for their professional aid and assistance in and about the business of said estate, from the beginning of his administration until the final settlement of the estate; and that such contract was a reasonable one, and would be a reasonable

compensation for the services to be rendered; and that the \$25 charge was a reasonable compensation for the services rendered for which it was charged,—then they should find for the plaintiffs such charges, with interest thereon from the time they were due.

“The defendants excepted to this charge, and requested the court to instruct the jury as follows:

“1. That if they believed a contract was made by Baker & Lewis with Tillman, as administrator of Campbell Cooper, deceased, by which he was to pay them a certain sum for their services, then Tillman was personally liable to them on such contract.

“2. That if the plaintiffs, as administrators of Tillman, paid said sum to Baker & Lewis, this was in discharge of a personal liability of their intestate, and not a charge against the estate of the defendants' intestate.

“3. That if an administrator employs an attorney to assist him, he is individually liable to such attorney for his services, and not in his representative capacity; and that such charge and liability cannot, in a court of law, be enforced against the estate which he represents.

“4. That if Tillman, as administrator of Cooper, employed Baker & Lewis, he only was responsible to them at law; and if his administrators paid the debt, it then became (if a charge at all) an equitable charge against the estate of Cooper, which could not be enforced at law.

“5. That if Cooper's estate was responsible at all, at law, to the plaintiffs, it is only responsible in this action for the value of the professional services actually rendered said estate, with interest.

“6. That this claim should have been adjudicated and settled in the probate court.”

The court refused each one of these charges, and to each refusal the defendants excepted; and they now assign as error the charge given by the court, and the refusal of the several charges asked.

JNO. M. PHILLIPS, for the appellants.

No counsel appeared for the appellee.

RICE, C. J.—The general rule is, that expenses, properly incurred by a trustee in the execution of his office as such, are treated as a charge or lien upon the trust estate; and that the trustee is entitled to reimbursement out of the estate, for all such expenses, when he has not only incurred, but has paid them. Conceding that expenses incurred by an administrator, under certain circumstances, and to a certain extent, in employing an attorney, may be treated as “expenses properly incurred by a trustee” within the meaning of the general rule; yet it is clear that *a court of law* is not the court to enforce such charge or lien, or to compel such reimbursement. In every suit to enforce such charge or lien, or to compel such reimbursement, an accounting between the estate and trustee is necessary. To allow a court of law to entertain such suit, would be to hold that it had jurisdiction to take and state accounts between the trustee and the estate, and that there may be as many accountings between the trustee and the estate as there are demands created by him for the benefit of the estate. We are persuaded that such is not the law.—See *Jones v. Dawson*, 19 Ala. Rep. 672; *Chapman v. Chapman*, 32 Ala. 106; *Vincent v. Rogers*, at present term; *Mulhall v. Williams and Wife*, 32 Ala. Rep. 489.

It is clear that the claim asserted by the plaintiff in this case cannot be enforced in a court of law. Whether it can be enforced in the court of probate, or in a court of equity, is a question not here presented for decision.

It is evident that the court below erred, at least, in the charge given, and in the refusal to give the 3d charge asked by the defendants; and without deciding expressly as to the correctness of its other rulings, the judgment must be reversed, and the cause remanded, for the errors above specified.

PEEBLES *vs.* TOMLINSON.

[ACTION FOR MONEY HAD AND RECEIVED.]

1. *Charge invading province of jury.*—Where there is the least conflict in the evidence relative to any material point in the cause, a general charge in favor of the plaintiff's right of recovery is erroneous.
2. *Proof of letters of guardianship.*—The certificate of a probate judge is not competent evidence to prove the grant of letters of guardianship, except as appended to a transcript from the records of his court showing the appointment.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by Augustus Tomlinson, as the guardian of Sarah H. Curtis, a lunatic, against Wm. H. Peebles, to recover money collected by the defendant from one P. S. McNeill on a note for \$994 40, dated April 4, 1848. The defendant pleaded, 1st, *non assumpsit*; 2d, the statute of limitations of three years; 3d, the statute of limitations of six years; 4th, payment; and, 5th, that plaintiff was not the guardian of Sarah H. Curtis. To the second plea the plaintiff replied that the cause of action was not an open account, and joined issue on the other pleas. On the trial, as the bill of exceptions states, the plaintiff introduced one Atkinson as a witness, who proved his delivery to the defendant, as the property of Mrs. Curtis, of the note on McNeill, and the defendant's execution of a receipt to him for that and several other notes; also, that he (witness) received these notes, with some other property, from one Crenshaw in Texas, "who was acting or professing to act as guardian or agent of Mrs. Curtis, and who delivered them to him on the order or at the request of Mrs. Curtis;" that he settled up Mrs. Curtis' business in Texas, and took said note from McNeill on settlement; that he brought Mrs. Curtis with him to Clarke county, Alabama, where she remained four or five weeks, and then returned to Texas in company with the defendant; that Mrs. Curtis resided in Texas when he

first knew her, and he had no knowledge that she had ever resided any where else; that he did not know of any property which she had in Wilcox county, Alabama, but could not say that she had none there. The plaintiff then read in evidence the deposition of said McNeill, who testified, that he owed Mrs. Curtis, in 1848 and 1849, the note above described; and that he paid said note to the defendant in this suit, to whom it had been assigned or transferred by Mrs. Curtis. The plaintiff then offered in evidence the certificate of the probate judge of Wilcox county, stating the fact that, on the 17th April, 1854, the plaintiff was appointed guardian of Mrs. Curtis. The defendant objected to the admission of this certificate, and reserved an exception to the overruling of his objection. "This was all the testimony offered to the jury; and thereupon the court charged the jury, that the evidence, if believed by them, was sufficient to entitle the plaintiff to recover." This charge, to which the defendant excepted, together with the admission of the evidence objected to, is now assigned as error.

JOHN T. TAYLOR, for the appellant.

B. WILLIAMSON, *contra*.

WALKER, J.—The plaintiff had no right to recover from the defendant the money collected by the latter from McNeill, if the note was the defendant's property. The witness McNeill testified, that the note was transferred or assigned by the plaintiff's ward to the defendant. This evidence being before the jury, it was improper for the court to assume that the note was not the defendant's property; and, consequently, it was erroneous for the court to instruct the jury to find for the plaintiff if they believed the evidence.—City Council of Montgomery v. Gilmer & Taylor, at the present term; Shepherd's Digest, 459, § 13.

[2.] The probate judge could, under his official seal, certify *the contents* of the records of his court; and the copy of the record, so attested, would be evidence. But he cannot *prove*, by his certificate, a fact *evidenced* by the record. The certificate of the probate judge of Wilcox

county, admitted in evidence, was clearly incompetent, and should have been excluded.

The judgment of the court below is reversed, and the cause is remanded.

PATTERSON vs. BLAKENEY.

[ACTION ON OPEN ACCOUNT.]

1. *Execution of writ of inquiry.*—In an action on an open account, the court is not authorized, on overruling a demurrer to the plaintiff's evidence, (Code, § 2352,) to render judgment final for the plaintiff without having the damages ascertained by a jury.
2. *Demurrer to evidence.*—When issue is joined on a demurrer to the plaintiff's evidence, in an action on an open account, it is the duty of the court to overrule the demurrer, if the jury might, from the evidence, legally find even nominal damages for the plaintiff.
3. *Reversal in part.*—On appeal by the defendant from a judgment of the circuit court, overruling his demurrer to the plaintiff's evidence, and rendering judgment final, without the intervention of the jury, for the amount of the account sued on; the appellate court, while reversing the latter part of the judgment, and remanding the cause that the damages may be ascertained by a jury, will not disturb the judgment on the demurrer, if it be correct.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Hugh Blakeney, against Claiborne Patterson, to recover the amount of an open account for \$58,59, due on the 1st January, 1856. The only plea was the general issue. On the trial, the plaintiff introduced the deposition of Franklin Blakeney, who testified, in answer to interrogatories, as follows: "I am acquainted with the parties to the suit. Hugh Blakeney merchandised in Forkland, Greene county, Alabama, in 1854 and 1855, and I was his clerk. I have examined the account hereto attached, marked 'A,' and say that the articles were purchased by him and his family; that they were our usual charges, and that the same was reasonable. I have examined the items of said account, and believe

them all to be correct. Said account was due on the 1st January, 1856. I kept the plaintiff's books myself. I compared the account with the books at the last fall court, and believe them to be correct. Claiborne Patterson, at the time he made said account with Hugh Blakeney, was living near Daniel's prairie, some eight or nine miles from Forkland. He was a farmer, and a man of family; and there was no other man of that name near there that I know of." This being all the evidence in the cause, the defendant demurred to it, and the plaintiff joined in the demurrer; whereupon the court overruled the demurrer, and rendered judgment final for the plaintiff, for the amount of the account sued on, with interest. The defendant reserved an exception to the ruling and judgment of the court, and he now assigns the same as error.

W. COLEMAN, and WM. P. WEBB, for the appellant.

J. D. WEBB, and R. F. INGE, *contra*.

RICE, C. J.—Even if the court below was right in overruling the defendant's demurrer to the evidence, it was in error in ascertaining the damages; for, upon a demurrer to evidence, if the court determines the issue in favor of the plaintiff, section 2352 of the Code requires that the damages, if unliquidated, should be ascertained by a jury; and here the damages are unliquidated. *Handley v. Dobson*, 7 Ala. 359.

[2.] The court below was right in overruling the demurrer to the evidence; because there was some evidence, from which the jury might legally have inferred and found, at least, that some of the articles charged in the account were sold and delivered to the defendant himself, and that therefore the plaintiff was entitled to recover some damages, although nominal, as to them. And whenever, upon the evidence demurred to by the defendant, it appears to the court that the jury could legally find any damages, although nominal only, for the plaintiff, it is the duty of the court to overrule the demurrer.

[3.] Following the precedent established in *Boyd v.*

Gilchrist, 15 Ala. 849, we shall not disturb the decision of the court below, in so far as it overrules the demurrer to the evidence and ascertains that the plaintiff is entitled to recover some damages; because, to that extent, the decision is correct. But as the ascertainment of damages by the court below was unauthorized, the judgment, thus far, and to that extent, is reversed, and the cause remanded, that the court below may cause a jury to be empaneled to ascertain the damages.

As the cause must be remanded for that purpose, and as we cannot know what evidence may be adduced before the jury who may be empaneled to ascertain the damages, it is deemed by us the more safe and just course not to decide anything upon the evidence now before us, as to the liability of the defendant for articles bought by "his family."

JEANS vs. LAWLER.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Letter from commissioner of general land-office, expressing opinion as to validity of entry, not competent evidence.*—A letter from the commissioner of the general land-office, expressing his opinion as to the validity or invalidity of an entry of land, and containing instructions as to what should be done with conflicting entries to the same land, is not competent evidence against a party claiming under one of the entries, to prove that his entry had been canceled in the general land-office.
2. *General offer of evidence partly illegal.*—When evidence is offered, of which a portion is illegal, the court may reject it all, and is not bound to separate the legal from the illegal.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. ROBT. DOUGHERTY.

THIS action was brought by Levi R. Lawler, against Robert M. Jeans, to try titles and recover the possession of the north-west quarter of the north-west quarter of section seven, in township twenty, range thirteen east, in

the Coosa land-district. The defendant was in the possession of the land as the tenant of one William M. Cosper, who claimed title to it in himself. On the trial, as appears from the bill of exceptions, the plaintiff read in evidence a certificate of the receiver of the land-office at Lebanon, dated October 19th, 1853, showing his entry of the land on that day, and the payment of the purchase-money. The defendant contested the validity of this entry, and attempted to show that it had been canceled in the general land-office because it conflicted with the prior rights of Cosper. For this purpose, he offered in evidence two transcripts from the records of the general land-office at Washington, properly certified by the commissioner; each of which was rejected by the court, and the defendant excepted. The contents of these transcripts are not in any manner described or identified, unless the several documents which, in each case, precede the certificate of the commissioner, are so held. Among these documents is a letter from the commissioner of the general land-office to the plaintiff, dated April 16, 1856, which is in these words:

"Sir: In reply to your letter of the 7th inst., I have to state that, if William M. Cosper has not already, or shall not hereafter, (giving him a reasonable time to do so,) perfect his location of the north-west quarter of the north-west quarter of section seven, township twenty, range thirteen, or pay for it at the rate of \$1 25 per acre, this office will order said land into market under the 9th clause of the circular of January 1, 1856. Your entry of that tract, of the 19th October, 1853, was illegal, because the land was not subject to private entry; and you should apply at once to have the purchase-money refunded. For the same reason, his entry of the 17th November, 1854, is also illegal; and if he does not perfect his original location, as above suggested, said tract must again be brought into market as above stated."

The bill of exceptions does not state for what purpose either of the transcripts was offered, nor on what grounds they were rejected by the court. Their rejection is the only matter assigned as error.

J. W. GUINN, for the appellant.

JNO. T. HEFLIN, *contra*.

WALKER, J.—Two distinct offers of testimony, made by the appellant, were rejected by the court below. A letter from the commissioner of the general land-office, was a part of the testimony embraced in each offer. This letter was but an assertion by the commissioner of the general land-office of his opinion as to the legality of the two different entries of the land in controversy, accompanied by information as to the manner in which the entry of the defendant might be perfected, and as to what should be done in reference to the entry of the plaintiff, and to the entry of the defendant if not perfected. This letter was inadmissible. The opinions which the commissioner of the general land-office may express, as to the validity of entries of land, cannot, upon any principle known to us, be evidence to defeat a title already granted by the proper office. The case of *Stephens v. Westwood*, 25 Ala. 716, does not, as argued by appellant, afford a precedent for the admission of such evidence. In that case, a transcript of an approved contract with an Indian reservee, under the treaty of March 24th, 1832, and of the assignments upon it, was admitted in evidence upon the certificate of the commissioner of the general land-office. Those papers were, of themselves, competent evidence; and being on file, and belonging to the office of the department at Washington, copies properly certified were received in evidence. Here, the letter offered in evidence was illegal. It had no bearing upon any question of fact in the case, and could only be pertinent to the case as an expression of the commissioner's opinion upon questions of law. The copy certainly could not be evidence when the original was thus illegal. The letters were not admissible to prove that the plaintiff's certificate of entry was canceled. If there was any valid order of the department for the cancellation of the certificate, it is certain that it could not be proved by a letter.—*Doe v. Long & Freeman*, 29 Ala. 376; *Brown v. Chambers*, 12 Ala. 697.

We need not inquire as to the legality of any of the

other evidence offered along with the letter; for it is well settled, in a vast number of decisions of this court, that the court may reject a general offer of evidence, a portion of which is illegal.—See the cases collected in Shepherd's Digest, 596, § 169.

The court did not err in rejecting the two offers of evidence made by the appellants, and its judgment must be affirmed.

STONE, J., not sitting.

LITTLE vs. FITTS.

[TRIAL OF RIGHT OF PROPERTY IN SLAVE.]

1. *Appellate jurisdiction of circuit court.*—The circuit court has no jurisdiction of a case brought up by appeal from a justice's court, on a trial of the right of property in a slave, under an execution issued by a justice in a different county, and levied by a constable, when it does not appear that any judgment was ever rendered in the case by the justice, and the appeal purports to have been taken from the judgment of the jury.
2. *Jurisdiction not conferred by consent.*—Where the court has no jurisdiction of the subject-matter and case, no waiver or consent of the parties can confer jurisdiction.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. NAT. COOK.

IN this case, an execution was issued by a justice of the peace of Tuskaloosa county, on a judgment rendered by another justice of said county, in favor of one John Little, against F. H. Ripley; and was levied by a constable of Mobile county on a slave, as the property of said Ripley. A claim was interposed to the slave by one John Fitts, before R. F. Butt, a justice of the peace of Mobile county, and a bond given for the forthcoming of the slave, "at the court-house in Mobile, on the 14th February, 1855, at 10 o'clock, A. M." Said Butt issued a *venire*

facias for the summoning of a jury of seven householders to try the right of property in the slave, returnable on the 7th April, 1855. A trial of the right of property was had, and the jury returned a verdict for the claimant; but this fact only appeared from the verdict endorsed on the execution by the foreman. The plaintiff in execution then removed the case, by appeal, to the circuit court; describing the judgment in the appeal bond as "a judgment rendered on the 7th April, 1855, by a jury of seven men, on a trial of the right of property in a slave named Bob, before R. F. Butt, Esq., a justice of the peace for said county, in favor of the said John Fitts, for \$45 65 debt, besides costs of suit." The claimant entered an appearance in the circuit court at the first term, and had the case continued. At the next term a *certiorari* to the justice was awarded on motion of the plaintiff, and at the next an *alias certiorari*, commanding him to send up a complete record showing the judgment which he had rendered in the cause. In answer to the *alias certiorari*, Wm. H. Hunter, the successor in office of said Butt, returned that said Butt had left the State without delivering his docket to his successor; that said docket had been demanded of the sureties of said Butt on his official bond, and diligent search had been made for it, but without success. The claimant then moved the court to dismiss the cause, "on the ground that the papers on file show no jurisdiction in the court;" and the court sustained the motion. The plaintiff reserved an exception to this action of the court, and he now assigns it as error.

W. C. EASTON, for the appellant.

WM. G. JONES, *contra*.

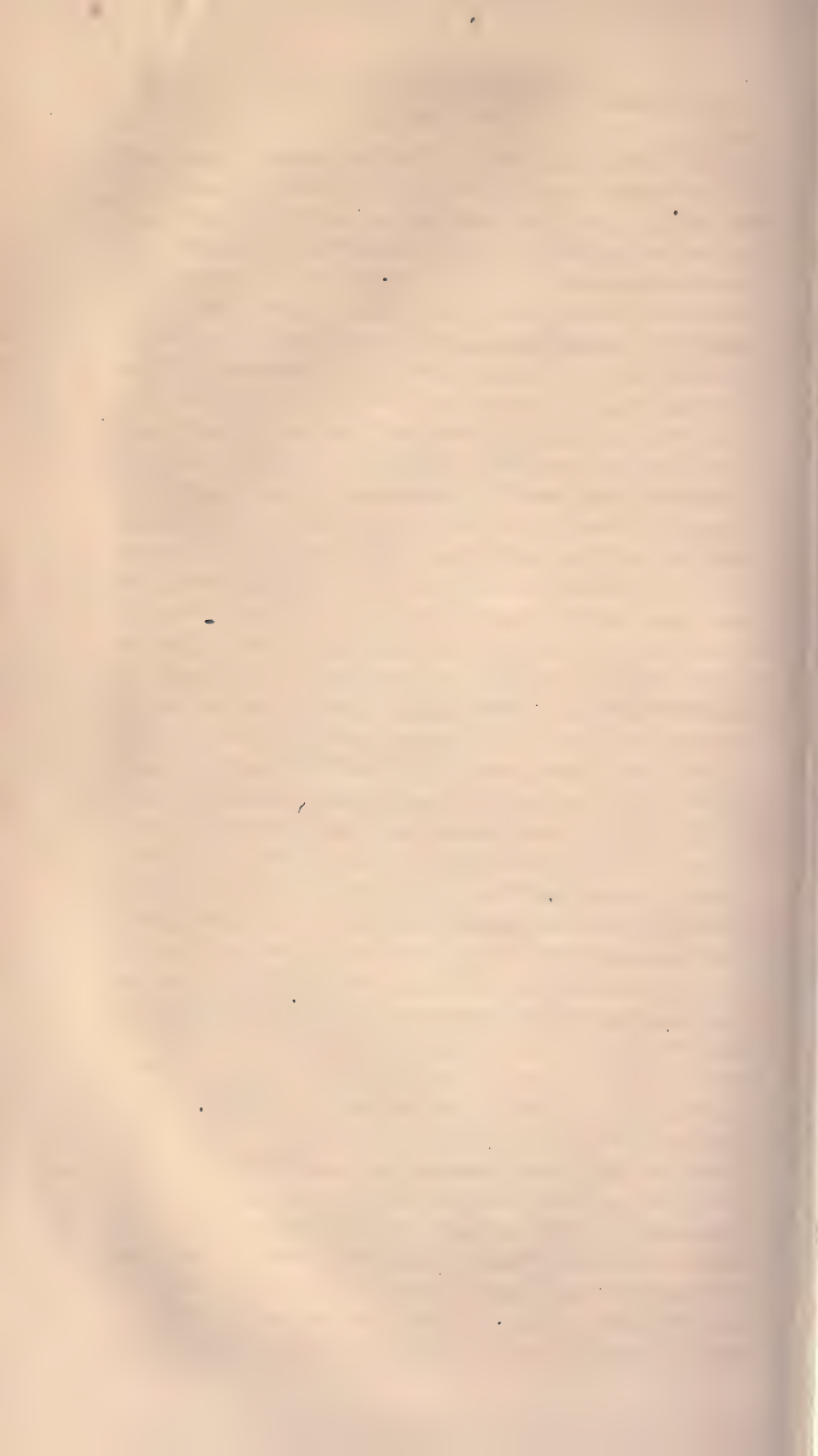
RICE, C. J.—The only question here is, whether the circuit court of Mobile had jurisdiction of the case. The execution was issued in December, 1854, by a justice of the peace of Tuskaloosa county, under a judgment rendered in that county in 1848, and was levied upon a slave by a constable in Mobile county. A claim to the slave was interposed, and thereupon a trial of the right of

property was had by a jury before a justice of the peace of Mobile county. The jury found the property not subject; but no judgment whatever appears to have been rendered by the justice before whom the trial of the right of property was had. The plaintiff in execution appealed, not from any judgment of the justice, for there was none; but from "*a judgment of seven men* on trial of right of property for one slave Bob, before R. F. Butt, Esq., a justice of the peace for said county" of Mobile, &c.

Upon these facts, we think the circuit court of Mobile had no jurisdiction. Its jurisdiction in trials of the right of property is derived from the statute. We do not know of any statute which gives it jurisdiction of a trial of the right of property, when the levy is made by *a constable*, and under an execution issued by a justice in a different county from that in which the levy was made, and when there is no appeal from *the judgment of a justice*. There are trials of the right of property in which, by appeal from the judgment of a justice, the circuit court of Mobile has jurisdiction, although the levy may have been made by *a constable*.—Code, §§ 2833–2837, 2811, 2368. But this is not one of them.—Code, §§ 2804, 2805; *Gunn v. Howell*, 27 Ala. 663; *Caldwell v. Meador*, 4 Ala. 755; *Dew v. The Bank of the State*, 9 Ala. 323.

[2.] Section 2368 of the Code applies only to "appeals and writs of *certiorari* from judgments of justices of the peace;" and therefore does not touch this case. In some cases of appeal from *a judgment of a justice* to the circuit court, the question arises as to what defects had been waived by the course of the appellee in the circuit court. See *Vaughn v. Robinson*, 20 Ala. 229. But no such question arises here; for no waiver or consent of the claimant, appearing in this record, can give the circuit court jurisdiction of the subject-matter and case.—*Crabtree v. Cliatt*, 22 Ala. 181.

The result attained by the circuit court was authorized by law. And for the reasons given in this opinion, the judgment of that court is affirmed.



REPORTS

OF

CASES ARGUED AND DETERMINED

At January Term, 1859.

SEARS *vs.* THE STATE.

[INDICTMENT FOR CARRYING CONCEALED WEAPONS.]

1. *What constitutes offense.*—A knife which, in *some* of its essential particulars, is unlike a bowie-knife, may nevertheless be within the prohibition of the statute (Code, § 3273) against carrying concealed weapons; *secus*, as to a knife which, “in *all* its essential particulars,” is unlike a bowie-knife.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. WILLIAM M. BROOKS.

THE indictment in this case charged, that the prisoner, Eli T. Sears, “carried concealed about his person a bowie-knife, or knife or instrument of like kind or description.” The evidence adduced on the trial is thus stated in the bill of exceptions: “The State introduced a witness who testified, that in August, 1857, in said county, he saw the defendant, at his request, unbutton his vest, and take from a belt around him a knife, which was about from seven to ten inches long, from an inch to an inch and a quarter broad, with a white handle, having the blade permanently fastened in the handle, and having a leather sheath; that he was not much acquainted with bowie-knives, or ‘Ar-

kansas tooth-picks,' and could not say what kind of a knife it was; but that he took it to be a bowie-knife. The defendant then introduced one Booth as a witness, who testified, that he saw the defendant at the time spoken of by the witness for the State, and saw the knife, and had examined it since; that he had known what bowie-knives were for seventeen years, and did not think that the defendant's knife was a bowie-knife; that a bowie-knife was generally longer and wider, the width generally being from one and a half to two inches, and the length from twelve to twenty inches; that the back and edge of a bowie-knife were straight, from the hilt to within about two inches of the point, and then the edge curved upwards, while the back deflected downwards, and then up to a point where the edge and back met; that the blade was wider, and swelled somewhat in thickness, at the point where the edge and back commenced to curve; that the blade, at that point, was wider and thicker than at the hilt, and heavier than any where else, in order to give weight to a descending blow; that the blade of the defendant's knife was about seven inches long, and one inch wide, and wider and thicker at the hilt than anywhere else; that the blade had but one sharp edge, and tapered on both sides from the hilt to the point; that it was not so wide or so heavy at any point as at the hilt; that it was not a bowie-knife, but was more like a dirk than anything else, though he did not know what name to give it. It was conceded by the defendant, that he carried concealed about his person, in the county of Autauga, within twelve months prior to the finding of the indictment, the knife spoken of by the witnesses."

"This being all the evidence, the court charged the jury, that it was not necessary, to find the defendant guilty, that the knife which the witnesses had deposed to, as having been concealed about his person, should be a bowie-knife—that if it was one of like kind or description, it was sufficient; that the law, in prohibiting the carrying of one of like kind and description, implied that there was a difference between such an one and a bowie-knife; and therefore, even if the defendant's knife was wider at the

point, and heavier there, and not so long as a bowie-knife; yet, if they believed it was of the like kind and description, they would find the defendant guilty.

“The defendant excepted to this charge, and asked the court to instruct the jury, that if they believed from the evidence that the knife, which the defendant was charged with having carried concealed, was, in its essential particulars, unlike a bowie-knife, they will find the defendant not guilty; which charge the court refused to give, and the defendant excepted.”

WM. H. & G. A. NORTINGTON, with ELMORE, YANCEY & CULP, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

RICE, C. J.—In view of the evidence, and of the concession made by the defendant, “that he carried the knife spoken of by the witness concealed about his person, in the county of Autauga, within twelve months previous to the finding of the indictment,”—the charge given by the court below is free from error. But there is error in the refusal of the charge asked by the defendant. It might be, that a knife which, in *some* of its essential particulars, was unlike a bowie-knife, might be a knife of like kind and description with a bowie-knife, within the meaning of section 3273 of the Code. But it seems to us impossible to deny the proposition, that a knife which, in *all* its essential particulars, is unlike a bowie-knife, is not a knife of like kind or description with a bowie-knife. That we understand to be the proposition asserted in the charge asked. For the error in refusing that charge, the judgment of the court below is reversed, and the cause is remanded.

DAVIDSON vs. THE STATE.

[INDICTMENT FOR GAMING.]

1. *Conviction on testimony of accomplice.*—A participant in a game of cards is an accomplice of his adversary, within the meaning of the statute (Code, § 3600) which forbids a conviction on the uncorroborated testimony of an accomplice. (RICE, C. J., *dissenting*.)

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. WILLIAM M. BROOKS.

THE bill of exceptions in this case is as follows:

“On the trial of this case, the State introduced but one witness, who testified, that he saw the defendant, within twelve months next prior to the finding of the indictment, and within said county, play a game of cards called ‘poker;’ that said game was played with him (witness), in the public road; that he and the defendant were the only persons who participated in the game; and that this was the only game he ever saw the defendant play. This being all the evidence, the defendant asked the court to instruct the jury, that if they believed the witness participated in the game of cards, and thereby became an accomplice of the defendant, a conviction should not be had on his testimony, unless he was corroborated by such other evidence as tended to connect the defendant with the commission of the offense. The court refused this charge, and the defendant excepted.”

GEO. W. GAYLE, for the prisoner. (No brief on file.)

M. A. BALDWIN, Attorney-General, *contra*.—Section 3600 of the Code does not apply to gaming cases, for the following reasons:

1. Section 3247 of the Code authorizes the finding of an indictment, in gaming cases, upon the testimony of a person who was engaged in the game, uncorroborated by any other evidence; and this was tantamount to declaring that testimony sufficient to convict on the trial. It could

not have been the intention of the legislature to authorize the finding of an indictment upon the testimony of a witness, whose evidence, if uncorroborated, would be insufficient to authorize a conviction. No possible good could have been accomplished by such a law, while useless costs and expenses would have been imposed on the county. It was not necessary, by a special provision, to exempt gaming cases from the operation of section 3600 of the Code. When the statute authorized the finding of an indictment on the uncorroborated testimony of a participant in the game, the general rule of law, applicable to evidence before grand juries, was brought to bear on such cases, thus excepting them from the operation of section 3600. The rule relating to evidence before the grand jury, as deduced from the authorities, forbids the finding of an indictment upon evidence which would not be sufficient to convict on the trial. The grand jury ought not to find an indictment on the testimony of an incompetent witness.—1 Chitty's Criminal Law, 318. An indictment, founded on the testimony of an interested witness, will be quashed.—The State v. Fellows, 2 Hayw. 340. An indictment was quashed, as having been irregularly found, because the grand jury received the testimony of a witness not under oath.—Gallison's R. 364. To the same effect is the decision in Keenan v. Boylan, 1 Sch. & Lef. 232, (cited in 1 Chitty's Criminal Law, 318,) where it was held, that the grand jury, on an indictment for perjury, should have the original affidavit in the making of which the perjury was charged, and that an office copy was not sufficient.

2. In the offense of gaming, there are no aiders, abettors, or accomplices, unless one person is assisting another to play the game. Each player is committing a separate and independent offense, particularly in the game of "poker," where the hand held by each is independent of the others.

3. The term *accomplices* is applicable only to felonies, and is unknown to that class of offenses denominated misdemeanors. The practice of admitting the testimony of accomplices, on the promise of pardon, was introduced

- instead of the ancient system of approvement, which had become obsolete.—2 Russell on Crimes, (Amer. ed.) 959; 1 Chitty's Criminal Law, 603. The doctrine of approvement applied only to cases of treason and felony.—Roscoe's Criminal Evidence, 153; 2 Russell on Crimes, 957; 4 Bla. Com. 329, note 13; 2 Hale's P. C. 67, 227; 2 Hawk. P. C. 281; 1 Chitty's Criminal Law, 603; Leach, 119. The doctrine in reference to accomplices, then, can only apply to cases of treason and felony, except where specially extended to other cases by statute.

WALKER, J.—Section 3600 of the Code is in the following words: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely show the commission of the offense, or the circumstances thereof." The question of this case is, whether one who played with the defendant, and adversely to him, at a game with cards, is an accomplice within the meaning of the statute above quoted.

An accomplice is defined to be, "an associate in a crime; a partner or partaker in guilt."—See Webster's Dictionary; Bouvier's Law Dictionary. In Foster's Crown Law, (341,) the word *accomplices* is said to take in all *participes criminis*. If, then, a person playing at a game with cards, adversely to the accused, and with him, participates in the commission of the offense condemned by the statute, he is an accomplice.

The offense is playing at a game with cards.—Code, § 3243. When two or more persons play cards together, although each may be contending with all the rest, it is the combination of all the successive acts of all the different persons, which constitutes the game at cards. Each player, by every act of his done in pursuance to the law of the game, contributes an appointed part to the combination of acts, which together make a game with cards. It is clear, therefore, that in playing at a game with cards, each player is a participant in the production of the result which the law condemns.

If the statutory offense were winning at a game with cards, then adversaries in the game could not be accomplices. The loser of the game could not be said to participate in the accomplishment of the unlawful object, (winning at a game.)

Our argument does not involve the position, that adversaries in fact are accomplices in law. Antagonists in playing cards are not adversaries, as to the thing which constitutes the offense. They agree together as to the playing at a game with cards, and each voluntarily contributes to that end; and they are adversaries as to which one shall perform his part in the game with the highest skill. There is a perfect agreement among the players that each shall perform his part, and the strife between them is which shall do it most skillfully.

If a community of purpose be necessary to constitute one an accomplice, our position is still maintainable. It would be absurd to contend, that any other common object than to commit the offense was necessary to make one an accomplice with the accused. Those who play together at a game with cards have a common object to play at the game, and that is the offense. They have diverse objects to play with the greatest skill, and that does not constitute the offense. Each sits down to the card-table with a common purpose to do that which the law condemns; but each has an ultimate object to accomplish, by playing at a game with cards in violation of the law. They concur in the purpose to violate the law. They do not concur in the object to be accomplished by the violation. The offense is complete before it is known who will be the winner. If two men were to agree together to commit a murder, and the motive of one was to gratify revengeful feelings, and of the other to obtain money, they would be accomplices, notwithstanding the diverse objects with which the crime was committed. So, in this case, those who agree in the violation of law, by playing at a game with cards, are accomplices, notwithstanding they do so for the purpose of beating each other in the game.

Playing at cards is not the *means* by which the *end* con-

demned by the statute is accomplished; but that is the very thing which constitutes the offense, and it is impossible for persons to play cards together without a common purpose, so far as their conduct goes to make out the offense.

The term *accomplice* is as applicable to participants in the commission of misdemeanors as felonies.—2 Russ. on Cr. 967, 968; Reg. v. Farler, 8 C. & P. 106.

It has been the universal practice in this State, to join all persons engaged together at a game with cards as defendants. From this long and well sanctioned practice we deduce an argument, that they are *participes criminis*. Wharton's Am. Crim. Law, § 429; Archbold's Crim. Pl. 96, note 1.

For the reasons above stated, we regard the witness in this case as an accomplice.

Judgment reversed, and cause remanded.

RICE, C. J., dissenting.

ROSENBAUM vs. THE STATE.

[INDICTMENT FOR ASSAULT AND BATTERY.]

1. *Admissibility of evidence in extenuation of assault.*—Under an indictment for an assault and battery, the prisoner cannot be allowed to prove what took place between him and the prosecutor at a previous interview in the forenoon of the same day, which is too far removed in point of time from the actual engagement to constitute a part of the *res gestæ*.
2. *Mode of impeaching witness.*—A witness cannot be interrogated about an immaterial matter for the purpose of laying a predicate to impeach or contradict him.
3. *Attorney's authority to make admissions.*—An agreement or admission of counsel, as to the conduct of a trial in court, has the same binding efficacy as if made by the party himself.
4. *Waiver of personal attendance of witness.*—A deposition, taken in a civil suit between the prisoner and the prosecutor, may be read in evidence on the trial of the criminal prosecution, against the prisoner's objection, on proof of an agreement between his attorney and the counsel for the State that it might be read on the trial.

5. *Charge referring to jury the meaning of words used by witnesses.*—A physician having testified, that he made a professional examination of a wound in the prosecutor's hand, but did not "*examine*" another wound in his side, a charge to the jury, instructing them that "they could consider whether the witness, in saying that he did not *examine* the wound in the side, meant that he did not examine it as a physician, or that he did not see or look at it at all," is not erroneous.
6. *Charge authorizing the jury to consider their own general knowledge and experience.* A charge to the jury in a criminal case, instructing them that, "in arriving at a correct verdict, they could consult their general knowledge and their own experience in life," is not erroneous.
7. *Objectionable expression in charge withdrawn or explained.*—The presiding judge, in charging the jury, having characterized certain matters relied on for the defense as "*little matters*," (as they had been previously characterized by the prisoner's counsel in his argument to the jury,) this furnishes no cause of reversal, when the record shows that, before the jury retired, the judge told them that, in using the expression, "it was far from the intention of the court to characterize them as small or insignificant, or to indicate in what light they were to be considered and weighed by the jury."
8. *Effect of good character as evidence.*—A charge to the jury in a criminal prosecution for a misdemeanor, instructing them "that evidence of good character went only to the question of the defendant's guilt, and, if they found him guilty, should not be regarded in mitigation of the fine they might think proper to assess against him," is erroneous.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. WM. M. BROOKS.

THE prisoner in this case, Louis Rosenbaum, was indicted for an assault and battery on one Jacob Gittleman, "exhibiting at the time an awl as a weapon;" and on his trial, having pleaded not guilty, reserved the following exceptions to the rulings of the court:

"Jacob Gittleman, upon whom the alleged assault and battery charged in the indictment was committed, was introduced as a witness, and testified, that Rosenbaum, a few days before the day on which the difficulty between them occurred, bought from him a pair of shoes at \$2,25, and, on the day of the fight, bought from him three sash at \$2,50, making in all \$4,75; that he paid him, on the day of the fight, \$4,75 for said sash; that on the evening of the said day, just about supper-time, and after witness had quit work for the day, and was preparing to go to his supper, said Rosenbaum came into his shop, which was in the town of Demopolis, and told him there was a mistake

in the amount of money paid him—that he had paid him \$1 more than he owed; that witness then insisted that defendant owed him \$4,75, and endeavored to satisfy him of that fact; that the defendant told him ‘not to come the Jew over him,’ and cursed him, and committed an assault and battery on him by sticking a sharp instrument in him, the particulars of which he detailed to the jury. On cross examination, the defendant’s counsel asked said witness, whether or not Rosenbaum paid the money for the sash, in the store of Taylor & Epps, on the day of the difficulty, and whether he did not admit that the amount due for said sash was \$3,75. The solicitor for the State objected to this question, and the court sustained the objection; to which ruling of the court the defendant excepted.

“The defendant’s counsel then asked said witness, whether, at the time of the payment of said money in said store, and in the presence of said Epps, the defendant did not say to Epps, ‘I want you to loan me \$3,75, I owe this man (Gittleman) \$3,75 for some sash, and I want to pay him.’ To this question, also, the solicitor objected, and the court sustained the objection; to which ruling the defendant excepted. The defendant’s counsel then asked said witness, whether there was not a mistake in the payment of said money at said store, and if the defendant did not then say that he wanted to pay him only \$3,75, and if he did not know that the defendant paid him \$4,75 by mistake. To this question, also, the court sustained an objection on the part of the solicitor, and would not allow the same to be asked; and to this ruling of the court the defendant excepted. The court then stated, that no evidence of anything that was said or done at the store of Taylor & Epps would be allowed, (it being, *prima facie*, inadmissible,) unless testimony was adduced to the court showing its relevancy; and the defendant thereupon ceased to offer further evidence in reference to said occurrence.

“The defendant’s counsel then asked leave of the court to state with what view said evidence was offered, and to state other circumstances, which the defendant expected

to prove in connection with such facts, to show the relevancy and admissibility of such evidence; but the court refused to allow counsel to make any statement in reference to said matters,—stating at the time, that the supreme court had intimated such practice to be pernicious—that it was well known that, in such instances, counsel were often mistaken, and made statements which they afterwards failed to prove; that he concurred with the supreme court, and would not allow counsel to make any statement of facts and circumstances which they expected to prove; that when testimony, *prima facie* inadmissible, was offered, the proper course was to introduce other testimony to show its admissibility, since otherwise inadmissible testimony would frequently get before the jury, and its subsequent exclusion could not always remove the impression it may have produced. To this ruling of the court, also, the defendant excepted.

“In the further progress of the trial, the solicitor offered in evidence the answers of Dr. Ruffin to the direct interrogatories propounded to him in a civil suit between the same parties for damages for the same injury; and, in order to authorize the introduction of said evidence, read in evidence the following agreement between the counsel for the prosecution and defense:

“The State vs. Louis Rosenbaum.	} In the circuit court of Marengo. It is consented and agreed, that the deposition of Dr. James S. Ruffin, taken in the civil suit of Gittleman v. Rosenbaum in this court, may be used and read in evidence in this case of State v. Rosenbaum, and the personal attendance of said Ruffin is dispensed [with;] and also in the State v. Gittleman.
---------------------------------------	--

LOMAX & PRINCE, for Rosenbaum,
McCAA & CLARKE, for Gittleman,
Y. L. ROYSTON, solicitor.”

“The defendant, by his counsel, objected to the introduction of the answers of said Ruffin as evidence on this trial; but the court overruled the objection, and allowed the said answers to go as evidence before the jury; to which ruling the defendant excepted.”

Dr. Ruffin's answers to these interrogatories were as follows: "I am a physician, and am acquainted with the parties to this cause. I saw Gittleman on or about the 1st February, 1857. He was wounded in the hand, and on the side. The wound in the hand was a penetrating wound; that is, one made by a sharp-pointed instrument. I did not examine the wound in the side. The wound in the hand was a very serious one. The instrument went into the palm of the hand, passing obliquely nearly through towards the wrist; thereby being more serious than if it had passed right through his hand, since it thus injured the tissues and ligaments of the hand. The back of the hand became very much swollen and inflamed, preventing him from using his fingers, and resisting all treatment until an exfoliation of the bone took place; and the wound then healed up slowly, and the hand returned to its normal condition. The wound must have been made with a sharp-pointed instrument, at least two or two and a half inches long, as the wound was of that length. A wound made by an awl, or three-cornered dirk, is more painful and dangerous than one made by a knife. The wound in Gittleman's hand was made by a small, sharp instrument of some kind; I do not know whether it was three-cornered or not. The last time I prescribed for him was on the 15th March, 1857. The wound incapacitated him from carrying on his trade as a mechanic. He was not well when I saw him on the 15th March, and had not then use enough of his hand to go to work. I never saw him threatened with any symptoms of tetanus, and could not say that there was any probability of his losing his hand. I charged him \$50 for our services; that is, the firm of Ashe & Ruffin. I was not the only physician summoned."

The State having here closed, the defendant offered one Epps, of the firm of Taylor & Epps, as a witness, and proposed to ask him the several questions, in reference to what occurred between the parties at said store, which had been previously propounded to Gittleman on cross examination; but the court, on motion of the solicitor, would not allow any of the questions to be answered,—

“stating, that the transaction at the store of Taylor & Epps had nothing to do with the fight at the shop of Gittleman, and that no evidence in relation to said transaction would be allowed to go before the jury, unless the counsel would show its relevancy by other testimony;” to which several rulings of the court the defendant excepted.

“Gittleman, the State’s witness, stated during his examination, that the defendant struck him twice, about an inch above the hip, with an awl, or other sharp instrument, and inflicted two wounds, about three-quarters of an inch deep, in his side; that his side swelled up in consequence of these wounds; that he struck Rosenbaum, during the fight, three or four times with a hammer, once on his arm, and also on his head. No witness but Gittleman was offered to prove the fight; his evidence, with Dr. Ruffin’s answers to the interrogatories, being the only evidence offered by the State. No evidence was offered, except the deposition of Dr. Ruffin, to show what physicians meant by the word *examine*, or that it had, when used by a physician, a different meaning from its ordinary acceptation as used by other persons. One Jones, a witness for the defendant, testified, that he saw the defendant the evening after the fight was over; that he was the bloodiest man he ever saw; and that he had either seven or nine wounds on his head, five of which were severe, being about an inch in length, and [cut] to the skull-bone, and having the appearance of having been made with a hammer. Many witnesses for the defendant testified to his good character as a peaceable, quiet, and orderly citizen. There was evidence, also, tending to show that the defendant was a saddler by trade, and was in the habit, when out of his shop, of carrying an awl about with him; and that he was moving his shop on the day of the fight, and had his pockets filled with all sorts of little things that he could get into them.”

“The court charged the jury, among other things,—

“1. That they could consider what Dr. Ruffin meant, when he said that he did not *examine* the wounds in said Gittleman’s side—whether he meant that he did not

examine them as a physician, or that he did not see or look at them at all.

"2. That, ordinarily, the weight to be given to good character was different in different cases—that in some cases it was entitled to great weight, and in others not to so much; that in a case of larceny, evidence of good character might, under some circumstances, entirely rebut the idea of guilt.

"3. That they could, in arriving at a correct verdict, consult their general knowledge and their own experience in life.

"4. The court, after alluding to several points relied on by the defendant's counsel as showing contradictions of the witness Gittleman, (which one of said counsel had characterized, in his argument to the jury, as '*little matters*,') and commenting thereon, observed to the jury, that they could give such weight to these '*little matters*' as they saw fit.

"5. That the evidence of good character went only to the question of the defendant's guilt, and, if they found the defendant guilty, should not be regarded by them in mitigation of the fine which they might think proper to assess against him."

The defendant having excepted to each of these charges, and a controversy having arisen in reference to the sufficiency of the exceptions, "the court then said, in the presence and hearing of the jury, the defendant, and his counsel, that the court had no recollection of using the words '*little matters*' in the charge to the jury; that if the phrase had been used, it was simply intended to call the attention of the jury, in general terms, to the matters referred to by the defendant's counsel in their argument; and that it was far from the intention of the court to characterize them as small or insignificant, or to intimate in what light they were to be considered and weighed by the jury."

I. W. GARROTT, with LOMAX & PRINCE, for the prisoner.
M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—We concur with the circuit court in holding, that what took place at the store of Taylor & Epps, in the forenoon of the day on which the fight took place, was not admissible in evidence. It was no part of the *res gestæ*—was too far removed in point of time from the actual engagement; and the only effect it could have had, would have been to embarrass the jury with considerations of the merits of the quarrel. It could not qualify or mitigate the *breach of the peace* of which the public complained. Ward v. The State, 28 Ala. 53; 1 Greenl. Ev. § 52; Robbins v. The State, 20 Ala. 36.

[2.] Neither was it permissible to interrogate the witness as to the immaterial matter which had previously taken place at the store of Taylor & Epps, and thereby lay a predicate for contradicting him. To justify this mode of attack upon the credibility of a witness, the matter inquired of must be pertinent to the issue.—1 Greenl. Ev. § 449.

A deposition, taken in a civil suit between the defendant and the person on whom the assault is charged to have been committed, was offered in evidence for the prosecution, and objected to by the defendant; the deposition was admitted, and the defendant excepted. To legalize this piece of testimony, the prosecution read in evidence the following agreement:

<p>“The State vs. Louis Rosenbaum.</p>	}	<p>In the circuit court of Marengo. It is consented and agreed, that the deposition of Dr. James S. Ruffin, taken in the civil suit of Gittleman v. Rosenbaum in this court, may be used and read in evidence in this case of State v. Rosenbaum, and the personal attendance of said Ruffin is dispensed [with;] and also in the State v. Gittleman.</p>
--	---	---

LOMAX & PRINCE, for Rosenbaum,
MCCAA & CLARKE, for Gittleman,
Y. L. ROYSTON, solicitor.”

It is contended for plaintiff in error, that the record does not show that Lomax & Prince, at the time they entered into said agreement, were the attorneys of Rosenbaum. Wagstaff v. Wilson, 4 Barn. & Ad. 359, is relied on in

support of this position. We need not, and do not, now determine whether the principle invoked would govern this case, if the question stood alone on the argument copied above.—See *Marshall v. Cliff*, 4 Camp. 133; *Roberts v. Lady Gresley*, 3 Car. & P. 380. The question does not rest alone on the agreement. In the bill of exceptions, and immediately preceding the said agreement, is the following language: “In order to authorize the introduction of said evidence, the solicitor for the State read in evidence the following agreement between *the counsel for the prosecution and defense*.” The record, then, recites that Messrs. Lomax & Prince were of counsel for the defendant Rosenbaum; and the agreement being without date, we do not feel at liberty to infer that it was signed when they had no authority to bind the defendant. On the contrary, we think it sufficiently apparent from the record that Lomax & Prince were his attorneys at the time they entered into the agreement.

[3.] Having attained the conclusion announced above, we think that well settled principles of law, as well as sound policy, require us to give to an agreement of counsel, as to the conduct of trials in court, the same binding efficacy as if the agreement had been made by the party. To hold otherwise, would greatly embarrass judicial proceedings.—*Albertson, Douglas & Co. v. Goldsby*, 28 Ala. 711, and authorities cited; *Riddle v. Hanna*, 25 Ala. 484; *Starke v. Kenan*, 11 Ala. 818; *Coke v. Nicholls*, 2 Yeates, 546; *Greenville v. McDowell*, 4 Iredell’s Equity, 481; *Kent v. Ricards*, 2 Md. Ch. Decis. 392; 1 Bishop’s Crim. Law, § 672.

True, where admissions or agreements are made improvidently, or through mistake, the court may relieve against them by means of its coercive power over its own officers, and may set them aside upon such terms as will meet the justice of the particular case.—*Harvey v. Thorpe*, 28 Ala. 250. In this case, no motion was made by defendant to obtain relief from the agreement. The testimony was objected to on general grounds; and, as we infer from the bill of exceptions, this objection was made after the trial had been entered upon. If the court had

sustained the objection at that stage of the proceedings, the result would probably have been to deprive the State of Dr. Ruffin's testimony altogether, unless the doctor had chanced to be in attendance on the court.

[4.] If it be contended, that the ruling of the court denied to the accused his constitutional right to be *confronted by the witnesses against him*, we answer that this, like many other constitutional privileges, may be waived by the defendant, in such a case as this. All the admissions of facts, or that certain witnesses, if present, would prove certain facts, made by defendants for the purpose of a trial, rest on this principle. We have been referred to no case which sustains this view.—See *The King v. Morphew*, 2 Maule & Selwin, 602; *Roscoe's Cr. Ev.* 78.

[5.] We can perceive no error in the first charge given. The jury are always judges of the meaning of language employed by witnesses. The context generally, and frequently the profession or occupation of the witnesses, should be regarded in arriving at the sense in which words are employed. Dr. Ruffin testified as to the wound in the hand, in such manner as to show he had given it a professional examination. Immediately afterwards, and in the same connection, he stated he did not examine the wound in the side. Yet he had testified, that Gittleman was wounded both in the hand and in the side. If he had not seen the wound in the side, he could not properly have testified there was such wound. We think the sense in which he employed the word *examine*, was a proper subject of inquiry for the jury.

[6.] There is nothing in the third charge for which we feel authorized to reverse. The plainest recital of everyday transactions would frequently, if not universally, be unintelligible to us, if we were not aided in the investigation by our general knowledge and experience. These are the lights by which we determine the probability or improbability of testimony, the truthfulness of witnesses, and the reasonable consequences of particular acts.—*Ogle-tree v. State*, 29 Ala. 693.

[7.] The remark of the circuit judge, characterizing certain matters relied on for the defense as "little mat-

ters," was fully explained and neutralized in the hearing of the jury, and before their retirement. This furnishes no cause of reversal.

[8.] Under our statutes, the jury assess the fine, in most or all cases of misdemeanor. This being the case, it follows that all evidence in mitigation, as well as evidence on the question of guilt, must go before the jury, and be considered and passed on by them.—See *Robbins v. The State*, 20 Ala. 36. The rule is different where the jury have nothing to do with the *degree* of guilt, but only pronounce on the single question of guilty *vel non*.—See *The King v. Lynn*, 2 Term Rep. 733; *King v. Sharpness*, 1 T. R. 227; *Rex v. Turner*, 1 Str. 139; *Rex v. Cox*, 4 C. & P. 538; *King v. Withers*, 3 T. R. 428; *King v. Ellis*, 6 B. & Cress. 145; *People v. Cochran*, 2 Johns. Cas. 73; *State v. Smith & Cameron*, 2 Bay, So. Ca. 62.

It was settled in the case of *Felix v. The State*, 18 Ala. 720, that evidence of previous good character was proper for the consideration of the jury, not only when a doubt exists upon the other proof, but even to generate a doubt as to the guilt of the accused.—See, also, *Wh. Am. Crim. Law*, § 643-4. The effect of this decision is to declare that, in criminal prosecutions, good character is original evidence for the accused, independent of the character of the other evidence which may be given in the cause. It is, then, evidence to be weighed by the jury in determining the *question* of guilt, and the *degree* of the defendant's criminality. In prosecutions for offenses which consist of different degrees, as declared and defined by law, no one, we apprehend, would hesitate to declare that, under the principle settled in the case of *Felix*, *supra*, good character should be weighed by the jury in determining the degree of guilt. Now, although few if any misdemeanors have legally defined degrees, most of them are in fact classified by the measure of criminality which attends them. Some assaults are more violent and aggravated than others; and yet the law, in the absence of some specified and particular circumstances and intents, has not declared any degrees in assault, or assault and battery. The jury, in pronounc-

ing upon the question of guilt, can render only a general verdict of guilty or not guilty.

In assessing the fine, however, the jury are not thus shackled.—Code, § 3307. They are clothed with a large discretion, which must have had for its object the accommodation of the punishment to the degree of criminality. In fact, the fine assessed in the particular case is but a reflection of the opinion of the jury on the guiltiness of the accused.

We hold, then, that the jury should have been instructed to regard the evidence of defendant's good character in determining the degree of the defendant's guilt; and as the *degree* of guilt can only find expression in the *amount* of fine assessed, the fifth charge given by the court is erroneous.

Lest this opinion may mislead, we will add, that whenever the grade or degree of guilt of an offender is ascertained by the jury, good character has then accomplished its entire object. We can perceive no reason why one of good character should be punished more lightly, than another who is not able to prove a good character, but who, in the opinion of the jury, is no more guilty than the former. There may exist in the one case as strong reasons for wholesome restraint and salutary public example, as in the other. The amount of the fine, however, is in the main left to the discretion of the jury; and we do not wish to be understood as placing restraints on the exercise of that discretion, to a greater extent than the statute has done. We, as a revising court, cannot in any given case assert, as matter of law, that the jury have exceeded or fallen short of their duty.

For the error above pointed out, the judgment of the circuit court is reversed, and the cause remanded.

RUSSELL vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Returning, endorsing, and filing indictment.*—When an indictment is endorsed by the foreman of the grand jury, “a true bill,” and is shown by the record to have been returned into court so endorsed; and the prisoner, without objecting to the legality or sufficiency of the indictment, pleads not guilty, he cannot move in arrest of judgment, on account of any informality in the finding, returning, or filing of it.
2. *When objection to grand jury may be made.*—Although the statute (Code, § 3591) requires that an objection to an indictment, because the grand jurors were not drawn in the presence of the officers designated by law, must be made at the term at which the indictment is found; yet, if the prisoner was deprived of the opportunity of making the objection at the proper time, by his confinement in jail in another county, the court may entertain the objection at a subsequent term.
3. *Prisoner's confinement in jail in another county, at term indictment is found, not good in arrest of judgment.*—The fact that the prisoner, at the term at which the indictment was found against him, was confined in the jail of another county, is not good matter in arrest of judgment, when it does not appear that he was thereby deprived of any legal right.
4. *Sentence of conviction corrected and affirmed.*—Where the judgment of conviction, in a capital case, does not specify the day on which the prisoner is to be executed, the appellate court, on affirming the judgment, (Code, §§ 3663-64,) will appoint the day of execution.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. WILLIAM S. MUDD.

THE prisoner, George Russell, was indicted for the murder of one John Henry, “by stabbing him in the neck with a knife;” pleaded not guilty; was convicted of murder in the first degree, and sentenced to be hanged. After conviction, he moved in arrest of judgment on the following grounds: “1st, because the indictment was not marked filed by the clerk of the court, during the first term of the court at which it was found, nor has it since been so marked with the true date of filing the same, signed by the clerk of the court, as required by law; 2d, because it does not in any manner appear that the indictment was ever filed in court; 3d, because it does not appear that the indictment was ever presented by a grand jury;

4th, because it does not appear at what term of the court the indictment was filed, or that it was ever returned into court; 5th, because it does not appear by what grand jury of Blount the indictment was returned into court; 6th, because it does not appear that the grand jury who returned it returned it into open court; 7th, because it does not appear that twelve of the grand jury were present when the indictment was returned into court; 8th, because there is no evidence of the identity of the indictment under which the defendant was tried and any indictment returned into this court; 9th, because this case was discontinued by not being regularly continued at the March term of this court, 1857; 10th, because it does not appear that the defendant was arraigned and pleaded before the jury were sworn to try his case."

"The only evidence," as the bill of exceptions states, "that was offered in support of the motion, or in opposition thereto, was the bill of indictment, with its endorsements, and the several entries in the case shown by the record." The indictment purported to have been found at the spring term, 1857. The only endorsements on it, as copied into the transcript, were in these words: "No prosecutor. A true bill," (which was signed by the foreman of the grand jury;) "Witnesses: James Long, William Latham," and others. At the same term of the court, an entry was made in the case in these words: "It appearing to the satisfaction of the court that a bill of indictment has been returned into this court by the grand jury of the county of Blount, endorsed 'a true bill,' charging the defendant, George Russell, with the crime of murder; and that the said George Russell has been committed to, and is still confined in the county jail of Madison county, for safe-keeping; thereupon, on motion of A. E. Van Hoose, solicitor, it is ordered and considered by the court, that the clerk of this court issue an order to the jailer of Madison county, authorizing and requiring him to deliver up said George Russell, if in his custody, to the sheriff of Blount county, upon demand; and that the said sheriff of Blount county be required to execute said order, and to have the said George Russell before

the circuit court of Blount county by the third Monday in September, 1857." At the September term, 1857, the cause was continued by the State, and the prisoner remanded to the jail of Madison county for safe-keeping. At the March term, 1858, the prisoner was arraigned, pleaded not guilty, and was tried; the minute entry showing the arraignment, by an incorrect interlineation, being made to read as follows: "This day came E. A. Powell, solicitor *pro tem.*, who, being duly arraigned, and hearing the bill of indictment read, pleads not guilty, as well as the defendant in his own proper person," &c.

The court overruled the motion in arrest, and pronounced sentence of death on the prisoner; but the judgment ordered a suspension of the execution, in order that the points reserved by the prisoner might be decided by the supreme court, and did not specify the day on which the sentence should be executed.

B. T. POPE, for the prisoner.—1. It was error to make any entry, or to take any action in the case, during the absence of the prisoner, except to send for him, and have him brought to that term of the court. His absence at that time, under his confinement in the jail of another county, deprived him of all right to plead under section 3591 of the Code.

2. The record does not show that any of the requirements of section 3535 were complied with in this case, except that some indictment "had been" returned into court by the grand jury at that term. The statute was intended to secure important rights to the prisoner, and its language is imperative. If any of the requisitions of the statute may be dispensed with, all may be disregarded. For aught that appeared in the record, another indictment might have been substituted with impunity, after the prisoner had pleaded to the first. The case of *Franklin v. The State*, 28 Ala. 9, by implication at least, if not directly, decides that the statute is peremptory. The cases of *Clarkson v. The State*, 3 Ala. 378, and *Shaw v. State*, 18 Ala. 550, were decided under the old statute, which was materially different from the Code.

M. A. BALDWIN, Attorney-General, *contra*.—1. The failure of the clerk to endorse on the indictment, "that it was filed in the court," was not available in arrest of judgment. The omission might be supplied at any time while the cause was *in fieri*, and did not affect the validity of the indictment. Pleading to an indictment admits its genuineness as a record.—Clarkson v. The State, 3 Ala. 378; The State v. Williams, 3 Stew. 454; Shaw v. The State, 18 Ala. 550; McKinney v. The People, 2 Gilman, 540. In these particulars, the Code does not differ materially from the old statute.

2. The validity of the proceedings was not affected by the prisoner's absence at the term at which the indictment was found, owing to his confinement in the jail of another county. As well might it be contended, that he should have been brought personally into court when the indictment was found, if he had then been confined in the jail of that county; or that an indictment cannot be found against a person who has not been already arrested. If he had shown that a plea in abatement to the indictment, if he had been present at the term at which it was found, might have been successfully interposed, there would be some hardship in his case; but no more than in other cases, frequently occurring, where the accused has no knowledge of an indictment having been found against him, until after the expiration of the time allowed for pleading in abatement. But he did not offer to show that a plea in abatement might, if he had been present, have been interposed to the indictment; nor does the record show that any objection existed.

A. J. WALKER, C. J.—Section 3535 of the Code is in the following words: "All indictments must be presented to the court by the foreman of the grand jury, in the presence of at least twelve of such jury, including the foreman; must be endorsed 'filed,' and such endorsement dated and signed by the clerk." The bill of indictment in this case appears to have had upon it the endorsement "a true bill," subscribed by the foreman of the grand jury; and the record recites, that it was made to

appear to the satisfaction of the court, that a bill of indictment had been returned into the court, endorsed a true bill; but it is not expressly asserted, that twelve of the grand jury, including the foreman, were present when the indictment was presented to the court, nor that the indictment was endorsed filed, and the endorsement dated and signed by the clerk.

Conceding, without deciding, that the want of the presence of twelve of the grand jury at the time when the indictment was presented to the court is an objection available otherwise than by plea in abatement, we are confident in the opinion, that the presence of less than the prescribed number is not to be presumed, when the record asserts, (as is done in this case,) that the grand jury returned the indictment into court, and nothing contradictory of the conclusion that twelve of the grand jury were present is disclosed in the record.

Our old statute, found in Clay's Digest, 460, § 1, was quite as mandatory, in requiring that the clerk should mark the indictment filed, as the section of the Code above quoted is in requiring that he must endorse "filed" upon the indictment, and date the endorsement. In reference to the want of the clerk's endorsement that the indictment was properly filed, according to the mandate of the old law, this court said in the State v. Clarkson, 3 Ala. 378: "There always is, and necessarily must be, a period in the progress of every prosecution, when the indictment is *in fieri*; and we are not aware that any entry made in it, or upon the minutes by the clerk, is necessary to give it effect as a record. Indeed, the very fact of pleading to it admits its genuineness as a record." In this case, the defendant pleaded to the indictment, without any objection to its verity or identity as a legal finding of the grand jury, or to the want of the required endorsement by the clerk. Having done so, an objection to the omission of the record to show that the proper endorsement was made comes too late, if it could be available at any time.

Section 3591 of the Code prescribes, that an objection that the grand jury "were not drawn in the presence of

the officers, or a majority of them, designated by law," must be made at the term at which the indictment was found. At the term of the court when the indictment was found, the accused was in jail in another county, and was not brought to the court. It is contended, that he may complain on error that he was not brought to the court, but was left in the prison of another county, at the term when the indictment was found, and therefore was denied an opportunity to make the objection, the appointed time for making which is the first term. The defendant had opportunity to have presented the objection, if it existed, after the term at which the indictment was found; and yet no such objection appears to have ever been made, or indeed to have existed. It is manifest that, if the court could have heard the objection at a subsequent term of the court, the defendant has no ground of complaint, unless he had presented the objection.

Notwithstanding the assertion of the Code as to the term at which the objection must be made, we decide, that it would have been competent for the court to have entertained the objection and allowed it, if sustained by proof, at a subsequent time. We will not construe the statute as prohibiting, peremptorily and absolutely, the making of the objection at a subsequent term. In giving it such a construction, we should, by a blind adherence to its letter, allow it an operation in derogation of common right, and revolting to the sense of justice: we should make the failure to plead, at a time when the accused was uninformed of the prosecution, or kept away by imprisonment, a waiver of the right to plead. Besides, we must, in construing the statute, look at the decisions in reference to similar statutes before the adoption of the Code. In *Sally v. Gooden*, 5 Ala. 78, this court decided, in reference to a statute which required that the defendant should be compelled to plead within the first week of the appearance term, and upon failure thereof forfeit his right to make any defense thereafter, that it should be so construed as to authorize the court to permit the defendant to plead at a subsequent term. Under a rule of practice which prescribed the time for the filing of pleas in abatement,

it was decided, that the court had the discretionary power to allow the filing of a plea at a term subsequent to that prescribed.—Cobb v. Miller, Ripley & Co., 9 Ala. 499; Massey v. Steele, 11 Ala. 340.

We thus find precedents in our own decisions, which justify the conclusion, that notwithstanding the statutory designation of the term at which a particular objection should be made, it was in the power of the circuit court to consider and pass upon it at a subsequent term. It is obvious, therefore, that the defendant's deprivation of the right or of the opportunity to make the particular objection was not a necessary result of his confinement in prison in another county during the term of the court at which the indictment was found. He certainly has no ground for complaint on error that he had no opportunity to make the objection, when he has not availed himself of his right to apply to the court at a subsequent term to exercise its power to hear and determine upon the objection. Whether we would revise the act of the court in refusing to consider the objection, we do not decide, and it may be we will never be called upon to decide.

We have carefully examined the record, and can find in the proceedings of the court below no error; and we must, therefore, affirm its judgment.

The sentence in this case is defective, in omitting to specify the precise day upon which it was to be executed. We understand that sections 3663 and 3664 authorize us, upon affirming judgment of the court below in such a case as this, to render the proper sentence; and we regard the question of our power to do so as settled by the decisions in Franklin v. The State, 28 Ala. 9, and Liles v. The State, 29 Ala. 24.

It is therefore ordered, that the defendant, George Russell, be, on Friday, the fifteenth day of April, A. D. 1859, between the hours of 10 in the forenoon, and 4 in the afternoon of that day, hanged by the neck until he is dead, at the place and by the officer prescribed by law.

HARRIS *vs.* THE STATE.

[INDICTMENT FOR GAMING.]

1. *Playing game with device or substitute for cards.*—A conviction cannot be had, under an indictment for gaming, on proof that the defendant played a game of euchre with dominoes, if the jury are satisfied from the evidence that the game of euchre with dominoes is an older game than euchre with cards, and that both cards and dominoes are still retained in common use in playing euchre ; unless the evidence also satisfies the jury that, as matter of fact, dominoes were used in that particular game as a substitute for cards, although that fact was not intended by or even known to the players themselves.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. WM. S. MUDD.

THIS case was before this court at its January term, 1858, when the judgment of the circuit court was reversed, and the cause remanded.—See 31 Ala. 362. On a subsequent trial in the circuit court, the defendant reserved the following bill of exceptions, which shows all the points presented for revision in this court :

“ On the trial of this cause it was proved, that the defendant, within twelve months before the finding of the indictment, at a store-house in said county where goods, wares and merchandise were kept for sale and sold, played at a game with dominoes ; that said game was played with twenty-eight pieces of bone, numbered from one to six, besides blanks ; that there were seven suits of said bones ; that the game played was generally called *dominoes*, but sometimes *euchre*, and was played by from two to five persons, in the manner following : The twenty-eight dominoes were turned with the spotted sides next to the table, and were shuffled about on the table ; each player then took five pieces, and another piece, called a *trump*, was turned up by the player who sat next to the dealer on the right. The dominoes having been drawn by each player, and the trump turned up, the player next to the

dealer on the left would say, either that he would pass, or order it up; and so on to each player, until it reached the dealer, who could either pass or take it up; if he took it up, he had to discard one from his hand; if it was ordered up by either of the players, the dealer had to take it up and discard; and if the one who ordered it up failed to make three tricks, his adversary would make two in the game, and he who ordered it up would be euchred; but, if he who ordered it up made three tricks, he would make one point in the game, and, if he made all five of the tricks, would make a march. The number of points required to make(?) *were* from five to eleven, and sometimes more, as the players might agree before commencing. Each player had to follow suit, if he could; and if he could not, then he might trump, or play any other piece he chose. The end of the domino having the largest number of spots was the one that was known as the suit."

"It was proved, that the defendant did not know how to play a game with cards, and knew nothing about cards; that he was a member of the church, and a strictly moral and religious man; that those who played with him were some of the best men in the county; that the proprietor of the store-house was also a member of the church, a moral man, and one who would not permit cards to be played in his house under any circumstances; that the defendant did not know that it was any violation of the law to play the game with dominoes which he played, and that said game had been so played in said town for about three years."

The State introduced several witnesses, as experts, who testified to the manner in which the games of euchre with cards and euchre with dominoes were played, and the several points of difference and resemblance between the two games. Several exceptions were reserved by the defendant to the rulings of the court in reference to the testimony of these witnesses, which have no material connection with the points here decided. "On cross examination, said witnesses testified, in substance, that they did not know which was the older game, euchre with dominoes or euchre with cards, nor could they say whether

or not either one of them was derived from the other; that since a full deck of cards consisted of fifty-two, and a euchre deck of cards of only thirty-two, they were inclined to the opinion that the game of euchre with cards was derived from some other game, and that the game of euchre with dominoes was the older game of the two; that euchre with dominoes was a regular and proper domino game, and had certain rules and principles controlling it, which were peculiar to it, and which did not exist in the game of euchre with cards," &c.

"After charging the jury in the language of the supreme court in this same case, at the last term of said court, as to the four points necessary to be proved by the State in order to convict the defendant, the court further charged the jury as follows :

"1. That if the defendant is guilty of violating the law, the jury have no right to look to his character, or that of any of the other parties who may have played with him; that the law is no respecter of persons, but deals alike with all men; that whether the party charged be respectable or disrespectable, high or low, worthy or unworthy, a christian or a sinner, if he has violated the law, he must suffer the penalty, as courts and juries must determine his guilt or innocence from the law and evidence alone.

"2. That if, at the time the game was played for which the defendant was indicted, dominoes had become used as a substitute or device for cards in playing euchre, it made no difference whether or not the defendant knew that they had become so used; that if he played a game of euchre with dominoes after they had become used as such substitute or device, at a store-house where goods were at the time sold to the public, and in said county, within twelve months before the finding of the indictment, then he would be guilty.

"3. That if the defendant used the dominoes as a substitute or device for cards, in playing the game of euchre for which he has been indicted, it would make no difference whether the dominoes had ever before been used for that purpose or not.

"4. That it was not necessary for the State to prove that the games of euchre with cards and euchre with dominoes are the same, or that a proper game of euchre with cards could be played with dominoes; but that it was sufficient to prove that they are substantially the same, played on the same principles, and with the same result.

"5. That the jury might look to the manner in which the games are played with cards and dominoes—the number of each used in the game, the following of suit, the number of tricks required to constitute points, the number of points to make the game, the particular names given to the number of tricks taken by each player, &c.—as circumstances from which to determine whether the dominoes were used by the defendant as a device or substitute for cards, or had become so used as a substitute for cards in playing euchre at that time.

"6. That it was immaterial whether cards or dominoes were invented first in point of time, or whether the game of euchre at cards or at dominoes was first played; that it was sufficient to prove that dominoes, in playing the said game of euchre for which the defendant was indicted, were substituted by him for cards, or had at that time become a device or substitute for cards.

"7. That it was immaterial whether or not the defendant knew that he was violating the law; that the question was, whether the law had been violated by him; and if so, that it was the duty of the jury to so find, without reference to the defendant's knowledge or ignorance that he was violating the law.

"8. That it was not material whether the number of cards used to play euchre, and the number of dominoes used to play euchre with dominoes, are the same or not; nor whether a person who could play the one would have to learn to play the other before he could play it, if dominoes were in truth substituted by the defendant in playing said game, or had become used at the time as a device or substitute for cards.

"9. That the statute prohibits, not only the playing at cards at a public house, but also the playing at any device or substitute therefor at such house."

To each of these charges the defendant excepted, and then requested the following written charges :

“1. That the jury, before they can find the defendant guilty, must be satisfied beyond a reasonable doubt that the game of euchre with cards is older than the game of euchre with dominoes.

“2. That the jury, before they can find that dominoes were used as a device or substitute for cards in playing the game of euchre, must believe that the game of euchre with cards is an older game than euchre with dominoes.

“3. That if the jury are not satisfied beyond a reasonable doubt as to whether the game of euchre with cards or with dominoes is the older, then they must acquit the defendant.

“4. That if the jury believe from the evidence that the game played with dominoes was a proper game at dominoes, as well as at cards; and that the defendant played with dominoes as and for a game with dominoes, and was not playing a game at cards, using the dominoes as a substitute or device for cards, they must find the defendant not guilty.

“5. That the jury, before they can find the defendant guilty, must believe that he used dominoes in the game as a device or substitute for cards.

“6. That if the jury believe all the evidence in the case, they should find the defendant not guilty.”

The court refused each one of these charges, and to each refusal the defendant excepted.

I. W. GARROTT, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—When this case was before in this court, (January term, 1858,) we stated four questions as properly referrible to the jury; and declared, that an affirmative response by that body to each of these four questions would entitle the State to a conviction of the defendant. One of those four questions was stated in the following language: “Had dominoes either become a device or

substitute for cards in playing the game of 'euchre' at the time the defendant played at the game for which he is indicted; or were they in fact used in that single game, though never before, as a device or substitute for cards." In another place we said, "It will be noticed, that the foregoing question numbered four is put or stated alternatively; and to prevent any misapprehension, it is proper to say that, if the jury decide either branch of said alternative question in the affirmative, that meets the requirements of the law, so far as the said question four is concerned."

The former record was silent on the question, whether cards or dominoes were first used in playing the game of euchre. The present record contains some evidence on that question. It is now contended, that if euchre with dominoes is an original, independent game, in use before euchre with cards was introduced, then dominoes cannot become a substitute for cards, in playing the game of euchre. We do not assent to this proposition, to the extent claimed. Instruments, older and first in use, might be employed as a substitute for those of more modern discovery. Oars, for many supposable reasons, might be substituted for the more modern steam-engine, in propelling a steam-vessel.

There is, however, in this inquiry, one point of view in which priority of use becomes material. We said it was sufficient, if dominoes had "become a device or substitute for cards in playing the game of euchre, at the time the defendant played the game for which he is indicted." The only legitimate import of this language is, that if, from former use, dominoes, in playing the game of euchre, had become stamped with the character of a device or substitute for cards, then euchre with dominoes was within the prohibitory terms of the statute. If, however, euchre with dominoes was an original, independent game, older in fact than euchre with cards, and the latter game had not substantially supplanted the former, then dominoes could not become stamped with the character of a device or substitute for cards in playing the game of euchre. The paddle-wheels, driven by the steam-engine,

may be a device or substitute for the oars of the row-boat; the latter, while both motive powers continue to be employed, cannot become stamped with the character of a device or substitute for the paddle-wheels of the steamboat.

That portion of the sixth charge given by the court, which declares it "immaterial whether the game of euchre at cards or at dominoes were first played in point of time," is in conflict with the views above expressed. In one phase of the 4th alternative proposition, priority of use was material. The jury should have been instructed, that if euchre with dominoes, as played by the defendant, was older in point of time than euchre with cards, and if both instrumentalities were still continued and retained in common use in playing the game, then dominoes can not have become stamped with the character of a device or substitute for cards in playing the game of euchre. In this event, the defendant cannot be convicted, unless the jury are convinced, *as a matter of fact*, that dominoes were used in this particular game as a substitute for cards.

Lest the jury may be misled by the sentence last above, we will add, that it is not important that the parties playing intended, or even knew, that dominoes were, in the game played, a substitute for cards.

The error in the 6th charge, above noted, was not remedied by any other part of the charge.—Holmes v. The State, 23 Ala. 17.

We offer no opinion on the weight of the evidence. That is a question for the jury.

We have found no other errors in the record.

Reversed and remanded.

DUPREE *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Admissibility of threats by deceased towards prisoner.*—Threats, made by the deceased a short time before the commission of the homicide, indicating an angry and revengeful spirit towards the prisoner, and a determination to do violence towards his person, which were communicated to the prisoner before the homicide, are admissible evidence for him.
2. *Admissibility of conduct of deceased towards servant or agent of prisoner.*—The conduct of the deceased, in going to the prisoner's premises, several weeks before the commission of the homicide, and there seeking a personal difficulty with a person who was in the employment of the prisoner, is not admissible evidence for the prisoner.
3. *Competency of person of mixed blood as witness.*—A person whose great-grandmother was the daughter of a mulatto, by a negress, is not a competent witness against a white person, (Code, § 2276,) although his father, maternal grandfather and great-grandfather were white men.
4. *Secondary evidence of testimony of absent witness.*—A written statement of the testimony given by a witness on the coroner's inquest cannot be received in evidence, although it is shown that the witness has since removed from the State.
5. *Mode of proving character.*—The bad character of the deceased cannot be established by proof of particular facts, showing misconduct or immorality, having no connection with the case; as that he was an escaped convict from the penitentiary of another State.
6. *Admissibility of prisoner's character as evidence.*—The character of the prisoner, for peaceable disposition and habits, is competent evidence for him.
7. *Competency of witness to testify to character.*—A person who is acquainted with the prisoner's character, and who has known him for eight or ten years, is competent to testify to his character, although he may have resided more than twenty miles distant from the prisoner's residence.
8. *Charges on law of self-defense.*—The prisoner having requested the court to instruct the jury, "that if they believed from the evidence there was a reasonable belief in his mind of some great personal injury or bodily harm about to be committed on him by the deceased," or "that there was reasonable ground on his part to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, then the killing under the circumstances would be excusable;" and the court having refused to give the charge, "except with the qualification that, if the danger appeared to be imminent or threatening, the prisoner would be excused,"—held, that neither the refusal of the charge as asked, nor the qualification added to it, was erroneous.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE prisoner, William H. Dupree, was indicted for the murder of one Smith, whose given name was alleged to be unknown to the grand jury, by shooting him with a gun; was convicted of manslaughter in the first degree, and sentenced to imprisonment in the penitentiary for three years. On the trial, as appears from the bill of exceptions, the State proved, that the deceased was shot and killed, on Sunday, the 1st day of August, 1858, at Twenty-one-mile bluff in Mobile county; and, for the purpose of showing that the prisoner was the perpetrator of the homicide, introduced as a witness one Lawrence Gregory, a youth of about sixteen years of age, whose testimony was as follows :

“ Witness was near the prisoner’s house on Sunday, and was sitting at a landing under an oak tree, when he heard the cries of a female slave of the prisoner’s as if receiving severe punishment. He heard her screams, and heard the sound of blows, like that of a whip, as he thought, distinctly. He did not count the blows, and was unable to say how many he heard. Just after, or at the time of hearing the blows, he saw the prisoner coming out of his house, with his gun, and running down towards the cabins from which the noise of the blows and screams proceeded. The cabins were about fifty or sixty yards from the prisoner’s house, and about twenty yards from the river. When the prisoner got within ten or fifteen steps of the cabins, he stopped about a half minute, as witness thought; then raised his gun, and fired; put down the gun; then raised it again, and fired the second time; and then turned, and ran towards his house. After the prisoner ran, witness saw Smith, for the first time, come out from behind the cabins, and run towards the prisoner; but he never got to the place where the prisoner stood when he shot. Smith ran fifteen or twenty yards from the cabin, turned round, and, after walking back some few steps, fell, and said he was a dead man. Witness thought the distance between him and the place where Smith fell might have been from one hundred and fifty to two hundred yards, but never measured it. He did not see Smith until he ran out from behind the cabin, and heard

no words pass between him and the prisoner. He did not see that Smith had either gun, whip, stick or knife, when he ran towards the prisoner. Immediately after the shooting, witness went near where Smith lay, and then went to tell what had happened. When he returned with some of the neighbors, they found the prisoner there; and the knife, stick and whip, hereafter mentioned, were there found. Witness afterwards saw Smith's body under an oak tree; it had been removed three or four steps from where he fell. He had seen Smith before that morning, who appeared to have been drinking; saw him go down to a grog-shop, which was about a quarter of a mile below the prisoner's house. There were two cabins on the prisoner's place, about eight yards apart, besides his dwelling; all within his enclosure. This negro woman and her children lived in one of them. These cabins, or one of them at least, were between witness and Smith."

"This was the only testimony as to the killing, but there was other evidence showing that Smith had been drinking the day he was killed." The State then introduced evidence showing the holding of the coroner's inquest on the body of the deceased, the character of the wounds which he received, the relative situation of the parties, in the opinion of the witnesses, at the time the deceased was shot, and his attitude and position at the moment; all of which, however, are immaterial matters as the case is here presented. "The prisoner then introduced one Williams as a witness, who testified, that he went to the prisoner's lot for some water on the Thursday next before the killing, and there met the deceased; that the deceased told him, that the prisoner's folks had been killing his chickens, and that he intended to kill the prisoner's chickens, and that, if the prisoner said a word about it, he would cut his throat; that he remonstrated with the deceased, but the latter said he would kill the prisoner before he left that place; that he also said, on witness further remonstrating with him, 'damn Dupree, he would kill him anyhow;' that Dupree was then absent from home; that witness, knowing the violent character of Smith, felt alarmed for Dupree and his family, and

accordingly went over to his house, on Saturday night before the killing, to warn him of his danger; that Dupree had not returned home when witness got to his house, and witness then determined to remain there all night to protect his family; that witness lived about three miles from the place; that Dupree returned between 9 and 10 o'clock that night, when witness told him of all these threats, and advised him to get out a peace-warrant; that the last words spoken by witness to Dupree that night were to caution him against Smith, whom witness had known for two or three years, and thought him a quarrelsome and dangerous man, especially when he was drinking. At the time the testimony of this witness was received, no objection was made to the same by the State; but, after the evidence on each side was closed, the solicitor moved the court to exclude from the jury the evidence of this witness, as to all the threats he had heard the deceased make against the prisoner, his household and family, which had been communicated by the witness to the prisoner; which motion was sustained by the court, and the prisoner excepted."

"The prisoner offered to prove, by a witness named Ladd, that he had heard Smith, on the day before the killing, say that he would whip Dupree; which was not communicated by him to the prisoner. The court ruled out this evidence, also, and the defendant excepted; but the court offered to admit any evidence of threats against the negro woman. The defendant then offered to prove, by one Boyd, that Smith, about three weeks before the killing, had threatened Dupree in a violent manner, and exhibited at the time his loaded whip; which threats were communicated to Dupree before the killing. The court excluded this evidence, also, on motion of the solicitor, but still offered to admit any evidence of threats against the negro woman; and the defendant excepted. The defendant then offered to prove, by a witness named Keen, that the deceased came into Dupree's premises, some weeks before the killing, with his loaded whip, and went to one of the cabins in the lot, where his hireling, a white man named Breedlove, then stayed, and com-

menced a difficulty with Breedlove, and threatened to whip him, and was only prevented from executing these threats by witness and two other men then living there; and that this was communicated to Dupree before the killing. The court excluded this evidence, also, on the solicitor's motion, but still offered to admit any evidence of threats against the negro woman; and the defendant excepted.

"The defendant offered to introduce the testimony of Mrs. Smith, the wife of the deceased, which had been given before the coroner's inquest, reduced to writing, and sworn to, after having proved that such was really and fully her testimony, and that she had removed to Georgia, shortly after her husband's death, and was now supposed to be there. The court refused to let the testimony be read, and the defendant excepted.

"The defendant offered three witnesses, aged nine, eleven, and thirteen years, who were the children of the woman Clara; and proposed to prove by them, that they were present at the killing, that it was done in self-defense, and the circumstances under which it took place. The solicitor then stated to the court, that these boys, as he had been informed, were not competent witnesses, being of mixed blood; and proposed to examine witnesses as to the condition of their mother and ancestors. The children were produced, and appeared to be white. One Norton testified, that the woman Clara was the mother of the children by defendant, a white man; that Clara was a mulatto; that her mother was a negress in appearance; that he had known them six or eight years only, and knew nothing of their ancestors. One Brown testified, that Clara, from her looks, was half-and-half; that her mother was black—not as black as some negroes, but too dark for a griffe; that Clara's children were by a white man; that her father was a white man, named Simon Chastang, and her grandmother was Jean Simon, or Seymour; that her mother, who was named Anastasia, was blacker in appearance than her grandmother; that her mother was dark griffe, and her husband, as he understood, was a white man; and that he had known some of

them since 1830. One Hatter testified, that he had known Clara and her mother for six or seven years; that Clara was a mulatto, while her mother appeared to be a regular negress—she was black, her nose flat, and her hair kinky. W. B. Brown testified, that he had known Clara and her mother for several years, but knew nothing of their ancestors; that he thought Clara, from her appearance, was a mulatto, and that her mother was black. The defendant then introduced William Fisher as a witness, who was a gentleman about sixty years of age, and a creole born in the city of Mobile, and who testified, that Clara, her mother, and probably her grandmother, who was named Jean Seymour, were born at Twenty-one-mile bluff on the Mobile river, below the 31st degree of north latitude, and had always lived there; that Anastasia, the mother of Clara, was about his age, but he did not distinctly remember Clara's age; that Jean Seymour was a griffe, and had white blood in her—was dark in color, but not entirely black; that Anastasia was the daughter of a white man, Simon Andre by name, who always lived with Jean as her husband; that they were called man and wife in Spanish times, before the change of flag, and had several children, who were all about the color and appearance of Anastasia; that Jean never had any other husband than said Simon Andre, and everybody recognized her children as his; that Simon Andre and Jean had both been deceased many years; that Anastasia's only husband was a white man, named Chastang, who was the father of Clara; that Clara was recognized by everybody as Chastang's child, and her children were by a white man; that these colored women were always free, and owned slaves and other property; and that they were treated as husbands and wives under the Spanish laws. This being all the evidence on this point, the court decided that the witnesses were not competent, on account of being of mixed blood; to which ruling of the court the defendant excepted."

"There was evidence tending to show, that the prisoner tried to avoid all difficulties with the deceased; that he was of a quiet and peaceable character, and, among his

neighbors, *was not considered so.* (?) The prisoner offered to introduce witnesses to prove his character, who lived in Mobile, twenty-one miles from the place of killing, had known him for eight or ten years, and were acquainted with his character for peace, &c.; but the solicitor objected to their introduction, and the court excluded them; to which ruling of the court the prisoner excepted.

"The defendant also produced a witness, who testified, that he had a requisition for Smith, at the time of the killing, as an escaped convict from the penitentiary of Georgia; and that he had informed the prisoner of this before the killing. This evidence, also, on motion of the solicitor, the court rejected; and the defendant excepted.

"The defendant asked the court to charge the jury—

"1. That if they believed from the evidence before them that there was a reasonable belief in the mind of the accused of some great personal injury or bodily harm about to be committed on him by the deceased, then he can be excused for taking life.

"2. That if the jury believe from the evidence, and from the circumstances of the case as detailed by the witnesses, that there was reasonable ground on the part of the accused to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, the killing under the circumstances would be excusable.

"The court refused to give either of these charges, except with the qualification, 'that if the danger appeared to be imminent or pressing, either upon the defendant or upon his servant, he would be excused;' to which refusal the defendant excepted."

DANIEL CHANDLER, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

(No briefs have come to the reporter's hands.)

A. J. WALKER, C. J.—The threats, proved by the witnesses Williams and Boyd, were made but a short time before the commission of the homicide. They were communicated to the prisoner before the homicide, by the

persons who heard them uttered. They were indicative of an angry and revengeful spirit, and of a determination to do violence to the prisoner's person. Such threats were admissible in this case, and the court erred in excluding them.—Powell v. The State, 19 Ala. 577; Carroll v. The State, 23 Ala. 28; Howell v. The State, 5 Geo. 48; Monroe v. The State, 5 Geo. 85; The State v. Zellers, 2 Hals. 280; Shorter v. The People, 3 Coms. 193; Am. Law of Homicide, 216; Campbell v. The People, 16 Ill. 17; Cornelius v. Commonwealth, 15 B. Monroe, 539.

[2.] The facts proved as to the conduct of the deceased, some weeks before, towards Breedlove, were irrelevant to the issue in this case. They pertained to a distinct and independent transaction, having no connection, which we perceive, with this case, and were properly excluded.

[3.] The children of Clara were incompetent witnesses. Their father, maternal grandfather, and great-grandfather were white men. Their great-grandmother was the child of a mulatto, by a negress. The great-grandfather is the first ancestor of pure white blood, to whom the genealogy of the witnesses can be traced. Beyond the great-grand ancestors, the ancestors of both sexes were either negroes, or of mixed blood. If the descent of the witnesses is traced downward from their great-grand-parents, one of whom was white, their grand-parents are of the first generation, their parents of the second, and they themselves of the third generation. It follows, that if in determining the competency of the witnesses, we are to reckon from the ancestors, one of whom was white, the witnesses proposed in this case are in the third generation.

The section of the Code pertaining to this question is as follows: "Negroes, mulattoes, Indians, and all persons of mixed blood descended from negro or Indian ancestors, *to the third* generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, must not be witnesses in any cause, civil or criminal, except for or against each other."—Code, § 2276. This statute must be understood as requiring a computation of the generations from ancestors one of whom is purely white; otherwise, it might be that persons of mixed

blood, by intermarriage among themselves, might produce descendants, competent to testify against white men, without any admixture of additional *white* blood in any generation. We hold, that there must be one white ancestor, of each generation, for three generations, before a competency to testify can be established; and the proposed witnesses, being of the third generation, were incompetent to testify, and there was no error in rejecting them as witnesses.

[4.] The statement of the testimony given in by the widow of the deceased, before the coroner on his inquest, was not admissible. She was living. The testimony was not that of a deceased witness. No reason is suggested for the admissibility of the evidence, save that the witness had emigrated to Georgia. There is no rule, which would justify the admission of such testimony on that ground.

[5.] So, also, the proof that the deceased was a convict, escaped from the Georgia penitentiary, was inadmissible. Particular acts of misconduct on the part of the deceased, and offenses against the law committed by him, and not connected with this case, were inadmissible. For a still stronger reason, parol evidence of his having been a penitentiary convict was inadmissible. It is not allowable to go into proof of particular acts, unconnected with the case, to show the character of the deceased.—*State v. Nugent*, 18 Ala. 521; *Pritchett v. State*, 22 Ala. 39; *Franklin v. State*, 29 Ala. 14.

[6.] The character of the prisoner for peaceful disposition and habits was competent proof for him.—*Felix v. The State*, 18 Ala. 720.

[7.] The witnesses, by whom it was proposed to show the character of the accused, had known him for eight or ten years, and were acquainted with his character. This was sufficient to qualify them to testify as to his character, notwithstanding they may have resided more than twenty miles from him. Residence in the immediate vicinity of the person, whose character is the subject of investigation, is not an indispensable qualification of a witness to testify as to the character. Such a remoteness of residence would not prove that the witness did not

know what the character was, and therefore would not disqualify him to testify on the subject.—*Hadjo v. Gooden*, 13 Ala. 718; *Martin v. Martin*, 25 Ala. 201.

[8.] There was no error, either in the refusal of the court to give the charges asked, without a qualification, or in the qualification of them, as stated in the bill of exceptions.—*Oliver v. The State*, 17 Ala. 587; *Harrison v. The State*, 24 Ala. 67; *Noles v. The State*, 26 Ala. 31. The charges asked might have misled the jury, by making the impression upon them that the plea of self-defense was sustained, although there was not a reasonable belief of a *present* necessity to strike for his own protection. This court will never reverse for the refusal of a charge, the tendency of which is to mislead the jury.

The judgment of the court below is reversed, and the cause remanded.

HENRY (A SLAVE) vs. THE STATE.

[INDICTMENT AGAINST SLAVE FOR HOMICIDE OF WHITE PERSON.]

1. *Joinder of offenses in indictment*.—In an indictment against a slave, for the homicide of a white person, the offense may be charged in different counts as murder and manslaughter.
2. *Sufficiency of indictment in description of offense*.—An indictment, charging that a slave “intentionally, but without malice,” killed a white person, is not sufficient under the provisions of the Code: section 3516, dispensing with the averment of “presumptions of law,” does not dispense with the necessity of averring that the killing was unlawful.
3. *Practice in trying issue on plea of former conviction or acquittal*.—When a former conviction or acquittal and not guilty are pleaded in a criminal case, the former issue must be disposed of before the latter is put to the jury.
4. *Conviction of less offense than charged in indictment*.—Under an indictment charging a slave with the murder of a white person, a conviction may be had for voluntary manslaughter. (STONE, J., *dissenting*.) (Overruling *Bob v. The State*, 29 Ala. 20.)
5. *Form and sufficiency of plea of former acquittal or conviction*.—In a plea averring a former conviction or acquittal, the former indictment must be set out in full, and the conviction or acquittal under it; and there must be an averment of the identity of the prisoner, and of the offense charged in the two indictments.

6. *Arrest of judgment on former conviction.*—A replication to a plea of *autre fois convict*, in these words, “arrest of judgment,” is fatally defective on demurrer: the replication ought to show that the former indictment was insufficient, or that a conviction could not lawfully have been had under it for the offense charged in the second.
7. *Error without injury in action of court on pleadings.*—Where two special pleas in bar, both substantially the same, and both defective, are interposed by the defendant in a criminal case, and issue is taken on one of them, the failure of the court to require the State to demur, reply, or take issue on the other, is not available to the defendant on error.
8. *Personal presence of prisoner in court.*—In capital cases, it is the safer practice to have the prisoner personally present in court, when the day for his trial is set, and when the order for summoning the jury is made.

APPEAL from the Circuit Court of Dallas, on change of venue from Wilcox.

Tried before the Hon. NAT. COOK.

THE indictment in this case was in these words:

“The grand jury of said county charge, that, before the finding of this indictment, Henry, a negro man slave, unlawfully, and with malice aforesaid, killed James Griffith, a white person, by stabbing or cutting him with a knife, against the peace and dignity of the State of Alabama.

“The grand jury further charge, that, before the finding of this indictment, Henry, a negro man slave, unlawfully and intentionally, but without malice, killed James Griffith, a white person, by stabbing him with a knife, against the peace and dignity of the State of Alabama.

“The grand jury further charge, that, before the finding of this indictment, Henry, a negro man slave, intentionally, but without malice, killed James Griffith, a white person, by cutting him with a knife, against the peace and dignity of the State of Alabama.”

A *nolle-prosequi* having been entered as to the first count, the prisoner then demurred to the whole indictment, and to the second and third counts separately; and the demurrers having been overruled, he filed nine pleas, which were as follows:

“1. That the State of Alabama ought not further to prosecute said indictment against him, because he saith that, heretofore, to-wit, at the spring term of the circuit

court of Camden, in and for the county of Wilcox, in the year 1858, he, the said Henry, was lawfully acquitted of said offense charged in said indictment; and this he is ready to verify," &c.

"2. That the State ought not further to prosecute said indictment against him, because he saith that, heretofore, to-wit, at the spring term of the circuit court of Wilcox county, held in and for said county, in the year 1858, at the court-house thereof, he, the said Henry, was lawfully convicted of the offense charged in said indictment; and this he is ready to verify," &c.

"3. That the State ought not further to prosecute said indictment against him, because he saith, that at the fall term of the circuit court held in and for the said county of Wilcox, on the second Monday after the fourth Monday of September, 1857, the grand jury then and there empaneled, sworn and charged to inquire for the body of said county, presented against him, the said Henry, a bill of indictment in the words and figures following," &c. (setting out the indictment.) "And the said defendant saith, that the offense charged in said former indictment, in fact, is the identical offense with which he is charged in this indictment, and not another or a different offense; and that the parties to said former indictment are the identical parties to this indictment, and not other or different parties; that at the spring term, 1858, of the circuit court held in and for said county of Wilcox, he, the said Henry, was arraigned and charged upon said former bill of indictment, and thereto pleaded not guilty; that at said last named term of said circuit court, he, the said Henry, was put upon his trial on said former indictment, and a jury of twelve good and lawful men were then and there empaneled and sworn well and truly to try the issue joined between the State of Alabama and him, the said Henry, on said former indictment, and the solicitor for the State then and there examined witnesses touching the facts charged in said former indictment; and that the said jury then and there returned as their verdict the following words: 'We, the jury, find the defendant guilty of voluntary manslaughter, as charged

in the indictment.' And the said Henry further saith, that at said last named term of said circuit court of Wilcox county, when said jury so returned said verdict, the said court then and there discharged said jury, without the consent of him, the said Henry, and without any necessity therefor. And this the said defendant is ready to verify," &c.

4. Not guilty, in manner and form as charged, &c.

"5. That the State ought not further to prosecute said indictment against him, because he saith, that heretofore, to-wit, at the spring term of said circuit court of Wilcox county, 1858, he, the said defendant, was lawfully acquitted of the offense charged in said indictment; and this he is ready to verify."

"6. That the State ought not further to prosecute said indictment against him, because he saith, that at the spring term of the circuit court of Wilcox county, begun and held on the second Monday after the fourth Monday in March, 1858, he, the said defendant, was lawfully acquitted of the offense charged in the said second count of said indictment; and this he is ready to verify."

"7. That the State ought not further to prosecute said indictment against him, because he saith, that at the spring term of the circuit court of Wilcox, 1858, he, the said defendant, was lawfully acquitted of the offense charged in the first count of said indictment; and this he is ready to verify."

"8. That the State ought not further to prosecute said indictment against him, because he saith, that at the spring term of the circuit court of Wilcox county, 1858, he, the said defendant, was lawfully acquitted of the offense charged in the first count of said indictment; and this he is ready to verify."

"9. That the State ought not further to prosecute said indictment against him, because he saith, that at the fall term of said circuit court of Wilcox county, held in and for said county on the second Monday after the fourth Monday of September, 1857, the grand jury then and there empaneled, sworn and charged to inquire for the body of said county, presented against him, the said

defendant, a bill of indictment in the words and figures following," &c. (setting it out.) "And the said defendant saith, that the killing with which he was charged in said former indictment, is the identical killing with which he is charged in this indictment, and not another or a different killing; and that the parties to said former indictment, are the identical parties to this indictment, and not other or different parties. And said defendant further saith, that at the spring term of the said circuit court of Wilcox county, he, the said defendant, was arraigned and charged upon said former bill of indictment, and thereto pleaded not guilty; that at said last named term of said circuit court of Wilcox county, he, the said defendant, was put upon his trial on said former bill of indictment, and a jury of twelve good and lawful men were then and there empaneled and sworn well and truly to try the issue joined between the State of Alabama and him, the said Henry, on said former indictment; that the solicitor for the State then and there examined witnesses touching the facts charged in said former indictment, and the said jury then and there returned as their verdict the following words: 'We, the jury, find the defendant guilty of voluntary manslaughter, as charged in the indictment.' And said defendant further saith, that at said last named term of said circuit court of Wilcox county, when said jury so returned said verdict, the said court then and there discharged said jury, without the consent of him, the said Henry, and without any necessity therefor. And this the defendant is ready to verify."

The indictment referred to in the third and ninth pleas, as therein set out, charged that the defendant, "unlawfully, and with malice aforethought, killed James Griffith, a white person, by stabbing him with a knife."

The State took issue on the first, fourth, and seventh pleas; demurred to the third, sixth, eighth and ninth; and replied to the second, "arrest of judgment." The court sustained the demurrer to the third, sixth, eighth and ninth pleas, and overruled a demurrer to the replication to the second plea; and issue was then joined on said replication.

When the case was called for trial, as appears from the bill of exceptions, the prisoner moved the court to quash the *venire*, and also objected to being tried at that term of the court, "because he was not in court, but was confined in jail, until the case was called for trial; and because the order of court setting a day for his trial, and directing a jury to be summoned for his trial, was made in his absence, without his consent, and whilst he was confined in jail." The court overruled each motion, and the prisoner excepted.

E. W. PERRUS, for the prisoner, made these points:

1. The demurrer to the whole indictment should have been sustained, because there was a misjoinder of counts. A slave cannot be charged, in different counts of the same indictment, with the murder and voluntary manslaughter of a white person. This indictment being framed under the Code, the rules applicable to indictments at common law do not apply; nor does section 3506 of the Code. *Bob v. The State*, 29 Ala. 20; *Lewis v. The State*, 30 Ala. 54.

2. The demurrer to the third count should have been sustained, because that count did not allege that the killing was unlawful or felonious. The prisoner may have killed the deceased, as charged in this count, in self-defense. An intentional killing is not necessarily a crime. According to the rules of evidence, an intentional killing of a human being, unexplained, would be murder; but no such presumptions can be allowed in pleading. 1 Bishop on Criminal Law, § 300; Code, § 3515. "Manslaughter is the *unlawful* and felonious killing of another, without malice."—Wharton's Amer. Crim. Law, (3d ed.) 423; Roscoe's Crim. Ev. 626; *Bob v. The State*, 29 Ala. 20; Wharton's Prec. 82, 83, 84, 85; Archb. Crim. Pl. 229; Code, p. 698, 3d form. If the use of the word *unlawful* be not absolutely essential to the validity of an indictment for manslaughter, some other word must surely be used to show that the killing was unlawful. At common law, the charge was, that the prisoner "feloniously did kill and slay."—2 Archb. 254. In an indict-

ment for murder, the words, "with malice aforethought," necessarily mean that the killing was unlawful; and, at common law, the word "feloniously" meant *unlawfully*. Section 3516 of the Code, if it applies to this question, is directly in opposition to the preceding section, and in conflict with the constitutional provision which secures to the accused, in criminal cases, a right "to demand the nature and cause of the accusation, and have a copy thereof."

3. The judgment must be reversed, because the issues joined on the pleas of not guilty, former conviction, and former acquittal, were all submitted to the jury at one and the same time.—*Nelson v. The State*, 7 Ala. 610; *Leach's Crown Law*, 138.

4. It was irregular to proceed to the trial of the prisoner, without requiring the State to demur, reply, or take issue on his fifth plea.

5. The prisoner had a right to be personally present in court, when the day for his trial was set, and the *venire* ordered; and this right could not be waived by the prisoner himself, much less by his attorney. He claimed this right so soon as he had an opportunity, and objected to being tried at that time because of his absence when those orders were made; and it was erroneous to force him to trial against his objection.—*Prine v. Commonwealth*, 6 Har. (Penn. St.) R. 103; *Hamilton v. Commonwealth*, 4 Har. (Pennsylvania State) R. 129; *Dunn v. Commonwealth*, 6 Barr, 384; *Hooker v. Commonwealth*, 13 Grattan, 763. The accused has a constitutional right, which extends to slaves, to be heard by himself and counsel.

6. The demurrer to the third and ninth pleas should have been overruled.—*Mahala v. The State*, 10 Yerger, 235; *Ned v. The State*, 7 Porter, 187; *McCauley v. The State*, 26 Ala. 135.

7. To show that it was unnecessary, in the pleas of former conviction and former acquittal, to set out the record of the former prosecution, see Archb. Pl. 112-14; Code, § 2520.

M. A. BALDWIN, Attorney-General, *contra*.—1. The first and second counts of the indictment are in strict compliance with the forms of indictments found in the Code. The third count is like the second, except that it omits the word *unlawfully*. Voluntary manslaughter, for which the prisoner was indicted, is a common-law offense, and is defined to be the unlawful killing of another without malice.—Waterman's Archb. 225. Where the crime existed at common law, the use of the term *unlawful* is unnecessary.—Waterman's Archb. 92, note; Hawk. P. C. 25; Bacon's Abr., *Indictment*, G, 1; Jerry v. The State, 1 Blackf. 396; The State v. Bray, 1 Missouri, 180. The law presumes every killing to be unlawful.—Commonwealth v. York, 9 Metcalf, 93; Woodsides v. The State, 2 How. (Miss.) 265; 2 Grattan, 594; 2 Russ. on Cr. 731; Code, §§ 3501, 3516.

2. The demurrers to the third, sixth, eighth and ninth pleas, were properly sustained. The third and ninth pleas, in form and effect, are pleas of former conviction, and aver a conviction of voluntary manslaughter of a white person under an indictment for murder; which can not be done.—Bob v. The State, 29 Ala. 20. The sixth and eighth pleas are bad, in form and substance, because they do not show in what manner the prisoner had been put in jeopardy.—1 Chitty's Cr. L. 461–62; Atkins v. The State, 10 Ark. 558.

3. The replication to the second plea was sufficient, and the demurrer to it was properly overruled.—1 Stew. 31; Cobia v. The State, 16 Ala. 781.

4. The first and seventh pleas, on which issue was taken by the State, and on which no action appears to have been had, threw the *onus probandi* on the prisoner. Waterman's Archb. 91. As no action appears to have been taken on them, they are presumed to have been waived by him.—McCollum v. Hogan, 1 Ala. 515; Crow v. Decatur Bank, 5 Ala. 249; Dougherty v. Colquitt, 2 Ala. 337.

5. The personal presence of the prisoner in court is only necessary at his arraignment, trial, when the verdict is received, when sentence is passed, and on motion in arrest

of judgment.—*Dan v. Commonwealth*, 6 Barr, 384; *Hooker v. Commonwealth*, 13 Grattan, 763; 9 Leigh, 624; 1 Chitty's Criminal Law, 411, 414.

R. W. WALKER, J.—The rule is well settled, that several distinct felonies, of the same general nature, may well be charged in separate counts of the same indictment. *Johnson v. The State*, 29 Ala. 65, and cases cited; *Commonwealth v. Hill*, 10 Cushing, 530; *Sarah v. The State*, 28 Miss. 267. There was no error, therefore, in overruling the demurrer to the entire indictment.

2. The Code provides, that the indictment "must contain a statement of the facts constituting the offense;" and that "the act charged must be stated with such certainty as to enable the court to pronounce judgment upon a conviction."—Code, §§ 3501, 3515. Indeed, it would not be in the power of the legislature to provide that it should contain less. Our organic law has declared, that in all criminal prosecutions, the accused has a right to demand "the nature and cause of the accusation, and have a copy thereof." He cannot be said to be informed of the nature and cause of the accusation, unless the indictment, under which he is arraigned, sets forth the facts constituting the offense with such certainty, and so fully identifies the accusation, that the accused and the court may know that the offense for which he is put upon his trial is the offense for which he is indicted, and that the court will be able to give the appropriate judgment on conviction.—*Noles v. State*, 24 Ala. 692; *Murphy v. State*, 24 Miss. 590; 2 Archb. 202, n. 1. The facts which constitute the offense of manslaughter are, that the accused has killed a human being, that the killing was unlawful, and that it was without malice.—*Wharton Cr. Law*, § 932. That the killing was unlawful is as much a fact, as that human life has been taken. It is as essential a constituent of the offense as the killing itself, and must be averred in the indictment, either by express allegation, or by the use of terms, or the statement of facts, which conclusively imply it. The fact that one person has intentionally, but without malice, killed another, does not

necessarily import a crime.—1 Bishop's Cr. Law, § 300. All the facts charged in the third count may be true, and yet the defendant be wholly innocent. It would be monstrous to hold the indictment good, when the supposition of the defendant's innocence is consistent with every fact stated in it. "It would not be competent for the legislature to make that an indictment, which failed to accuse a party of a crime."—*Noles v. State*, 24 Ala. 692.

Section 3516 of the Code, when properly construed, is not in conflict with the principles here stated. That section provides, that "neither presumptions of law, nor matters of which judicial notice is taken, need be stated in the indictment." It has been urged in the argument, that it is not necessary, under this section, where the fact of killing is alleged, to superadd the charge that it was unlawful, for the presumption of law assigns to it that character. If this be a sound construction of this statute, it would follow that, in an indictment for murder, it would be unnecessary to allege that the killing was with malice aforethought; because, the fact of killing being shown, the law presumes it to have been upon malice, until the contrary appears.—2 Russell on Crimes, 231; *Commonwealth v. York*, 9 Metc. 93. We should thus be forced to hold, that an indictment, which simply charged that "A. B. killed C. D. by shooting him with a pistol," was a good indictment for murder. From this it would result, that the same brief and comprehensive form would answer for all the kinds of homicide, and that there need be no distinction between an indictment for murder and one for manslaughter. But we have seen that, both by constitutional requirement and legislative provision, "the act must be stated with such certainty as to enable the court to pronounce judgment upon a conviction." If a defendant were tried under the brief form just supposed, and a general verdict of guilty were rendered by the jury, what judgment would or could the court pronounce? Of what offense would the defendant be convicted—murder, voluntary manslaughter, or involuntary manslaughter?

We think that section 3516 was not designed to apply to legal presumptions, such as those we have mentioned.

To make that section harmonize with sections 3501 and 3515, and with the declaration of rights securing to the accused information of "the nature and cause of the accusation," we must hold, that it refers not to those disputable presumptions which may be overcome by opposing proof, but to those conclusive presumptions of law which forbid all further inquiry, and allow of no proof that the fact is otherwise. An allegation that the defendant deliberately published slanderous words, which he knew to be false, would, under section 3516, be a sufficient allegation that the publication was malicious; for, from the facts alleged, the law conclusively presumes that such was the case.—Burrill, 46-7. On the other hand, the presumption that the possession of personal property, lately stolen, is a guilty possession, is a disputable presumption, which only holds good until disproved. An indictment, which merely charged that certain property had been stolen, and that very shortly thereafter the defendant was found in possession of it, could not be considered as importing a charge of larceny; and yet it would be, if section 3516 can be considered as applying to any presumptions of law, except those which are termed conclusive. That section may also have been designed to dispense with the statement of those absolute conclusions of law founded upon certain given facts. For example, where it is alleged that the defendant, with malice aforethought, killed a human being, it is a conclusion of law that he murdered him; and under section 3516, the statement of this conclusion is unnecessary.

The 3d count was insufficient, and the demurrer to it ought to have been sustained.

3. Where a defendant pleads *autrefois acquit*, or *autrefois convict*, and not guilty, both issues ought not to be put to the jury at the same time. To do so "would lead to the absurdity that the jury would be obliged to find on both; and yet, if their first finding was for the prisoner, they could not go on to the second, because the first finding would be a bar. They are distinct issues, and the jury must be separately charged with them." Until the issue upon the plea of former acquittal, or former

conviction, is disposed of, there can be no trial in chief. *State v. Nelson*, 7 Ala. 610; *Leach's Cr. L.* 138; 1 Russ. Cr. 837, note. If the defendant consents that all these issues may be submitted at the same time, or if he suffers this to be done without objection, it may be, that he could not complain of the irregularity on appeal. Upon that question we express no opinion. We simply mean to indicate what is the correct practice, in cases where these pleas are interposed.

4. The rule has always been, that a person indicted for one felony could be convicted of another felony legally included in the one charged.—2 *Leading Cr. Cases*, 137, 457, 462, 560, and authorities cited. This rule of the common law has been recognized and extended by our statute. For whereas, at common law, if the defendant was charged with a felony, he could not be convicted of a misdemeanor, although the latter might be legally included in the former; under our statute, the defendant may be convicted of any offense, whether felony or misdemeanor, which is included in that for which he stands indicted.—Code, § 3601. The most common illustration of the common-law rule just adverted to, was the practice of convicting of manslaughter on a charge of murder. Indeed, it has been an established principle of law for centuries, that murder necessarily includes manslaughter. *Rex v. Mackalley*, 9 Coke, 67 (*b.*) This results from the essential nature of the two offenses, and is not by any means a consequence of the fact that the punishment visited by the common law upon one was more serious than that inflicted upon the other. Murder embraces all the constituents of manslaughter, with other elements of criminality superadded. The person guilty of murder is guilty of every thing necessary to constitute manslaughter, and of something besides. It seems to be a proposition which is demonstrated by its statement, that the murder of a white person by a slave necessarily includes the manslaughter of a white person by a slave, just as the major proposition in logic includes the minor, or as the whole of a physical substance includes its component parts. When a slave is charged with the murder of a white per-

son, and the proof makes out a case of manslaughter, the most that can be said is, that he is not guilty of part of the offense charged, but is guilty of the residue. And it never was required that the proof must sustain every averment of the indictment, in order to justify a conviction under it; but, if so much of the charge is proved as amounted to an offense punishable by law, the defendant might be convicted of such offense.—2 Leading Criminal Cases, 137.

In the recent case of *Bob v. The State*, 29 Ala. 20, it was held, that under an indictment for the murder of a white person, a slave cannot be convicted of involuntary manslaughter. If this case be a correct exposition of the law, it necessarily follows, that under such an indictment, a slave could not be convicted of voluntary manslaughter. All the reasons which are urged as applying in the one case, exist in full force in the other. In that case it seems to have been considered, that because the punishment of manslaughter, when committed by a slave upon a white person, had been increased by statute, and made the same as the punishment denounced against murder, it must therefore be regarded as a distinct statutory offense, and as no longer included in murder. The fact that the punishment has been aggravated, certainly does not alter the nature of the offense, or change the elements which compose it, but simply modifies the consequences resulting from its commission. Notwithstanding the increased punishment to which it is subjected, it still remains, as before, an offense all of the constituent parts of which are necessarily included in murder; and it comes, therefore, within the very letter of the latter clause of section 3601 of the Code, which provides that "the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged, whether it be a felony or misdemeanor."

In the *State v. Waters*, 39 Maine R. 54, under a statute which provided that assaults with intent to murder, kill, maim, rob, &c., should be punishable with imprisonment in the penitentiary for not more than twenty years, it was held, that if the defendant be indicted for an assault with

intent to murder, he may convicted of an assault with intent to kill; and this upon the principle, that the former offense necessarily included the latter, although both were punishable alike. It seems impossible to doubt the correctness of this decision.

The decision in *Bob v. The State*, *supra*, is in direct conflict with the previous case of *Stephen v. The State*, 15 Ala. 534, which is not noticed in the opinion, and in which it was held, that under an indictment for the murder of a white person, a slave could be convicted of voluntary manslaughter. When the case last referred to was decided, the statutes defining and regulating the punishment of these various offenses, when committed by slaves, were identical with the provisions of the Code on the same subject.—Clay's Digest, 472, § 2; *ib.* 413, §§ 3 and 4; *ib.* 439, § 12; Code, §§ 3312, 3084-5, 3601.

A conclusive test of the correctness of the principle asserted in *Bob v. The State*, *supra*, is afforded by supposing that a slave is indicted for the manslaughter (either voluntary or involuntary) of a white person, and that on the trial the proof makes out a case of murder. If the rule adopted in that case is a sound one, the defendant could not be convicted on such proof, because the theory of which that rule is the result is, that the two offenses are essentially distinct and different, and that the manslaughter of a white person by a slave is not included in murder. He would be a bold judge, who, in the case supposed, would hold that the defendant was entitled to an acquittal, because the State had proved too much. And yet the only ground on which his conviction could be justified, would be that the offense proved necessarily included the one charged. Mr. Bishop suggests, as a definition of manslaughter, "the unlawful act which results in the death of a human being;" and adds, "In this definition murder is also included; and properly so, because an indictment for manslaughter may be sustained while the proof is of murder."—2 Bishop's Criminal Law, § 659.

After a careful consideration of the question, we are forced to the conclusion, that the ruling of the court upon

this point in the case of *Bob v. The State*, *supra*, is unsound in principle, and not reconcilable with the true intent and meaning of section 3601 of the Code. And inasmuch as that decision may be productive of serious inconvenience in practice, we feel constrained to express our dissent from it, and our adherence to the rule as settled in *Stephen v. The State*, 15 Ala. 534. The following authorities, and many others which might be cited, fully sustain the views here expressed: *State v. Standefer*, 5 Porter, 523; *State v. Peter*, 1 Stew. 38; *Nancy v. The State*, 6 Ala. 483; *Burns v. The State*, 8 Ala. 313; *Flanagan v. The State*, 5 Ala. 477; *Stephen v. The State*, *supra*; *Dinkey v. Commonwealth*, 5 Harris, 126; *People v. McGowen*, 17 Wend. 386; *Commonwealth v. Griffin*, 21 Pick. 523; *Commonwealth v. Kneeland*, 20 Pick. 206; *Reynolds v. State*, 1 Geo. 227; *Johnson v. State*, 14 Geo. 55; *Slaughter v. State*, 6 Humph. 410; *People v. Jackson*, 3 Hill, 92; *King v. State*, 5 Howard, 730; *Sarah v. State*, 28 Miss. 267; *Brennan v. People*, 12 Ill. 511; *Commonwealth v. Drum*, 19 Pick. 479; 1 Bishop's Criminal Law, §§ 531, 538.

Under an indictment which charges 'a slave' with the murder of 'a white person,' the defendant may be convicted of voluntary manslaughter; and if so convicted, and the judgment is arrested without his consent, he can not be held to answer a second indictment for the offense of which he has been once lawfully convicted. If, however, the judgment was arrested at his instance, he may be again tried under a new indictment, charging him with the offense of which he was found guilty.—*State v. Phil*, 1 Stew. 31; *McCauley v. State*, 26 Ala. 139; *Slaughter v. State*, 6 Humph. 410; 2 Leading Cr. Cas. 554; 1 Bishop's Criminal Law, § 673.

5. The pleas of *autre fois acquit* and *autre fois convict* consist partly of matters of record, and partly of matters of fact. They must set forth the former indictment, and the acquittal or conviction under it; and it seems to be essential that the record thereof, or at least of the indictment, should be set out in full. They must also aver the identity of the defendant with the person formerly acquit-

ted or convicted, and the identity of the offense charged in the first with that set forth in the last indictment. 1 Russ. Crimes, 837, note; 1 Chitty's Criminal Law, 459; Wharton's Cr. Law, § 558; 2 Hale's P. C. 241; 2 Leading Cr. Cas. 560; *McQuoid v. The People*, 3 Gilm. 76; *Atkins v. The State*, 16 Ark. 568; *United States v. Shoemaker*, 2 McLean, 120; *Wortham v. Commonwealth*, 5 Randolph, 669; *Rex v. Wildey*, 1 M. & S. 128; *Warton's Precedents*, 658.

Section 3520 of the Code, even if it can be considered as applicable to any part of the pleadings in criminal cases except the indictment, does not modify the rules just stated as to the essential constituents of these pleas. That section simply provides, that where a judgment is pleaded, it is not necessary to state the facts conferring jurisdiction on the court which rendered it; and makes the allegation, that the judgment 'was duly rendered,' a substitute for the statement of the jurisdictional facts. It does not dispense with the necessity of setting out the record of a former indictment in any case, where, at the common law, it was essential to do so. Tested by the rules here laid down, the 6th and 8th pleas were insufficient, and the demurrers to them were properly sustained.

6. The 2d plea of the defendant was open to the same objections on account of which we have just held the 6th and 8th defective. But, instead of demurring to it, the State interposed a replication in these words, "Arrest of judgment." If it had been shown that the indictment, under which the former conviction took place, was insufficient; or that under it the defendant could not have been lawfully convicted of the offense charged in this one, the fact that the judgment in the former case had been arrested, though without the consent of the defendant, would have been no defense to this prosecution.—*State v. Phil*, 1 Stew. 31; 2 Leading Criminal Cases, 554. But the replication contains no such allegation. For aught that appears, the former conviction may have been upon an indictment which justified it, and the judgment may have been arrested without the prisoner's consent. Under such circumstances, the arrest of judgment would

have been an unauthorized proceeding, and the defendant could not be held to answer a second indictment for the same offense. The demurrer to this replication should have been sustained.

7. There is no substantial difference between the 1st plea, on which issue was taken, and the 5th plea. These pleas were both defective, for the reasons stated in considering the 6th and 8th. Even if the record did not authorize the presumption that the defendant had waived the 5th plea; yet, inasmuch as it was defective, and as he had the benefit of it under another plea substantially identical with it, we cannot hold that he has sustained any legal injury by reason of the failure of the court to require the State either to demur, reply, or take issue upon it.

8. The record shows that the defendant was not present in person when a day was set for the trial of the case, and when the court made the order for summoning the jury. Whether this would work a reversal of the judgment, is a question we need not decide. It is certainly the safer practice to have the defendant, in a capital case, in court whenever such an order is made.—See the authorities on this subject collected in 2 Leading Crim. Cases, 451, *et seq.*; see, also, *State v. Hughes*, 2 Ala. Rep. 102; *Hooker v. Commonwealth*, 13 Grattan, 763; 1 Chitty's Cr. L. 411, 414, 487.

The other questions presented by the record may not arise upon a future trial of the case. What we have said will be a sufficient guide for the court below in conducting further proceedings against the defendant.

The judgment is reversed, and the cause remanded. Let the prisoner remain in custody, until discharged by due course of law.

STONE, J.—Section 3312 of the Code declares, that “every slave who is guilty of murder, or of assault with intent to kill any white person, or who is guilty of the voluntary manslaughter of a white person, or the involuntary manslaughter of a white person in the commis-

sion of an unlawful act, must, on conviction, suffer death."

It is manifest that each of the offenses enumerated in the section above copied, except the first, has been raised in magnitude by the statute. Assault with intent to kill was, at common law, only a misdemeanor; and manslaughter, though a felony, was much less heinous than murder. The ingredients which raise assaults with intent to kill, and manslaughters, to the rank of capital felonies, are, that the perpetrator shall be a slave, and the slain a white person. These ingredients, as I understand the rule, constitute these offenses statutory. They must be proceeded against under the statute, and a common-law form of indictment will not justify a trial and conviction under the statute. In fact, as I conceive, no conviction of a slave could be had, under an indictment found as at common law, for the offenses committed on white persons, manslaughter, or assault with intent to kill.—*Nelson v. The State*, 6 Ala. 394; *Flanagan v. The State*, 5 Ala. 477; *Williams v. The State*, 15 Ala. 259; *Ham v. The State*, 17 Ala. 188; *Murray v. The State*, 18 Ala. 727; *Turnipseed v. The State*, 6 Ala. 664; *Eubanks v. The State*, 17 Ala. 181; *Beasley v. The State*, 18 Ala. 535.

Section 3506 of the Code provides, that "when the offenses are of the same character, and subject to the same punishment, the defendant may be charged with the commission of either in the same count in the alternative." The offenses of murder, and of assault with intent to kill, and manslaughter, either voluntary or involuntary, when committed by a slave on a white person, are of the same character, and subject to the same punishment. These several offenses may, then, be charged in the alternative in one and the same count. No one, I apprehend, would controvert this proposition. If these offenses, when committed by a slave on a white person, are statutory offenses, are of the same character, and subject to the same punishment, I cannot well conceive how the first of the offenses includes each of the others.

Another difficulty: Section 3312, so far as it declares the punishment of murder when committed by a slave,

applies alike to the murder of a slave and a white person. For a murder committed on a white person or a slave, the slave perpetrator must suffer death. Here the analogy ceases. The other offenses which are made capital by section 3312 of the Code, are limited in their operation to slave perpetrators on white subjects. For manslaughter, or other less offense, committed by one slave upon another, the punishment is much lighter, and in many cases before a different jurisdiction.—Code, §§ 3314, 3316, 3317. When a slave is indicted for murder, under section 3312 of the Code, it would seem unnecessary to aver the status of the deceased—whether a white person, or a slave, or free person of color. In either case, the punishment is alike capital. This being the case, how can the rule of my brothers be made to operate? If the person slain be a white person, then the charge of murder, according to their view, will include within it the other statutory, capital felonies enumerated in section 3312 of the Code. On the other hand, if the person slain be a person of color, and if the doctrine of inclusion be applied, it will take in the whole range of offenses to the person, less than murder, embracing manslaughter, mayhem, assault with intent to commit murder, and assault and battery. It was evidently contemplated by the legislature, that all offenses, less than murder, committed by slaves on slaves, might and should be brought to a more speedy trial than the circuit courts afford.—See Code, §§ 3316, 3317. Still, it would not be safe to affirm, that these sections take away from the circuit courts all jurisdiction of the offenses therein enumerated. Probably sections 3316 and 3317 furnish only an additional tribunal for the trial of slaves.

The construction of my brothers will, according to my apprehension, lead to most embarrassing results. Under their view, as I understand it, we will be forced to hold, that murder, when imputed to a slave, is a *propositus*, with two distinct and dissimilar lines of descent; the one embracing two capital felonies, while the other includes all the grades of offense less than murder, from manslaughter down to the insignificant misdemeanor of an assault and battery, by one slave upon another.

I think the rule of inclusion applies, when the slayer and the slain are both persons of color. This would present a clear case of an "offense, consisting of different degrees."—Code, §§ 3601, 3312, 3314, 3316, 3317. I can not well perceive how the crime of murder can also be made to embrace another class of offenses, which are punished with severity equal to that inflicted on the crime of murder itself.

I have felt it my duty to say this much in defense of the decision in the case of *Bob v. The State*, 29 Ala. 20. Both that case and this, so far as this question is concerned, probably do no more than settle a rule of practice. It is not very important, in what manner the rule is declared. Settled either way, it can be conformed to without inconvenience to the profession, or detriment to public justice.

MOLETT *vs.* THE STATE.

[INDICTMENT FOR FAILURE TO KEEP WHITE PERSON ON PLANTATION.]

1. *Sufficiency of indictment in statement of time.*—Under the provisions of the Code, (§ 3512,) an averment of time is not necessary in an indictment, except where time is a material ingredient of the offense: if the offense is charged to have been committed before the finding of the indictment, but after a specified day which is beyond the period prescribed as the limitation of a prosecution, it is nevertheless sufficient on demurrer.
2. *Limitation of prosecution for misdemeanor.*—When a prosecution for a misdemeanor is commenced by indictment, the indictment must be found (Code, § 3374) within twelve months after the commission of the offense; but, when the defendant is bound over to answer an indictment to be preferred against him, the commencement of the prosecution dates from that time, and not from the time when the indictment is found.
3. *Informer unnecessary.*—A demurrer does not lie to an indictment, because it does not appear to have been preferred at the instance of an informer.
4. *What constitutes offense of keeping slaves on plantation without presence of white person.*—If a person keeps his slaves on a plantation separate from that on which he resides, and four miles distant from it, without the presence of a white person as agent or overseer, he is guilty of the offense denounced by the act of 1856, (Session Acts 1855–6, p. 18,) although he owns all the land intervening between the two places.

5. *Constitutionality of statute creating that offense.*—The act of 1856, “the more effectually to secure subordination among slaves, by requiring the owner or overseer to reside with them,” (Session Acts 1855–6, p. 18,) is not violative of any constitutional provision.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. WILLIAM M. BROOKS.

THE indictment in this case was found at the November term of said court, 1857, and was in these words :

“The grand jury of said county charge, that before the finding of the indictment, and after the first day of March, 1856, William P. Molett, being then and there the owner of certain slaves, did suffer and permit more than six hands, the property of said William P. Molett, to reside on a plantation belonging to him, known as the ‘Mill place,’ in the county and State aforesaid, for three months consecutively; and that neither he, the said Wm. P. Molett, nor any overseer or white agent, remained on the same place with said hands, or within the distance of one mile thereof; against the peace and dignity of the State of Alabama.”

The defendant moved the court to quash the indictment, “because it did not appear on the indictment that there was an informer in the case;” and reserved an exception to the overruling of the motion. A demurrer was also interposed to the indictment, and overruled; but the record does not show what causes of demurrer, if any, were specified. It appeared that another indictment, found at the preceding May term of the court, had been quashed on demurrer, at the term at which this indictment was found; and that the defendant had then been required to find bail for his appearance to answer a new indictment.

On the trial, as appears from the bill of exceptions, the State introduced witnesses who testified, in substance, that between the 1st March and the 1st June, 1856, they were frequently on the plantation mentioned in the indictment; that they there saw ten or fifteen slaves, belonging to the defendant, who worked and lived on the place; and that no white person resided on the place, or, so far

as they saw, superintended the slaves. "The defendant then proved, that the place mentioned in the indictment was part of a continuous body of land belonging to him, and on which he resided; that he had several negro-quarters, and five different plantations, located on said lands at convenient distances from each other, and some of them within a mile of his residence; that he acted as overseer of his own slaves, and was a vigilant overseer; that he was frequently on the place mentioned in the indictment, superintending his negroes in the day-time, and, at night, returning to his residence four miles distant; that he had no overseer or other white agent at any of his said negro-quarters and plantations, except as above stated; that he was, during the years 1856 and 1857, at no time absent from home, or from his several plantations, so much as a week at a time. It was proved, however, that when he went to or visited his said plantations, he remained on each but a short time during the day, and not at all at night." All the evidence is set out in the bill of exceptions, but a more particular statement of it is deemed unnecessary.

"On this evidence, the court charged the jury,—

"1. That if they believed the evidence, the defendant did not, within the meaning of the law, remain on the plantation, or within a mile thereof, during any three months consecutively, from March, 1856, to November, 1857.

"2. That if they believed from the evidence that the defendant suffered more than six of his slaves to reside on the plantation mentioned in the indictment, for three consecutive months, during the period of eighteen months next preceding the finding of the indictment in this case; and that neither the defendant, nor any overseer or white agent, remained on said place, or within one mile thereof, at any time during three consecutive months, they should find the defendant guilty, if said place and said slaves belonged to him."

To each of these charges the defendant excepted, and requested the court to instruct the jury as follows:

"That if they believed from the evidence that the land

on which the defendant resided in 1856 and 1857 was the same continuous body of lands on which the plantation described in the indictment was situated; and that all of said lands belonged to the defendant; and that the defendant vigilantly overseered his slaves, and superintended them as owner, while they were at work on the place, without being absent from them, or ceasing to attend to them in person, for three months consecutively during those years,—then the defendant is not guilty, although the jury may believe from the evidence that he did not remain at the same place or plantation where the negroes resided, or within one mile thereof, during any three months consecutively during those years.”

The court refused to give this charge, and the defendant excepted to its refusal.

The overruling of the demurrer to the indictment, and of the motion to quash it, the charges given by the court, and the refusal of the charge asked, are the matters presented for revision in this court.

GEO. W. GAYLE, with BYRD & MORGAN, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—The indictment, found *on the 17th November, 1857*, alleges the offense to have been committed before the finding of the indictment and after the *first day of March, 1856*. The offense may have been committed after the first day of March, 1856, and not within twelve months before the finding of the indictment. The indictment fails, therefore, to show the commission of the misdemeanor within the period prescribed by the statute of limitations. Before the Code, this would have been a fatal objection; but it is not now necessary to make any averment that the indictable act was done within the time mentioned in the statute of limitations. No specification of the time is necessary, unless time is a material ingredient of the offense.—Code, § 3512; and Form No. 1, page 698.

The forms prescribed by the Code make sufficient an allegation, that the offense was committed before the

finding of the indictment. It cannot vitiate, that the indictment, instead of embracing within its allegation all past time, limits to a certain specified day in the past the period within which the offense was committed.

[2.] One year is the period of limitation for a misdemeanor.—Code, § 3374. Although it was not necessary to aver in the indictment, that the offense was committed within twelve months before commencement of prosecution, yet it was necessary to prove it. One of the charges authorized a conviction, if the offense was committed within eighteen months before the finding of the indictment. That charge was wrong, and on account of it there must be a reversal. The indictment in this case appears from the record to have been the commencement of the prosecution. The charge was probably given upon the supposition, that the defendant had been bound over six months before the indictment was found. If that had been the case, the period of limitation would have been computed from the time when the defendant was bound over. Code, § 3376. But there does not appear to have been any proceeding against the defendant before the indictment.

[3.] That it was not necessary that there should have been an informer is decided in *Williamson v. The State*, 16 Ala. 431.

[4.] The negroes were on a plantation different from that on which the defendant resided, separated and distinguished from it, and four miles distant; but the intervening territory between the two plantations belonged to the defendant. This last circumstance does not make the plantation where the slaves remained less a distinct and different place from that on which the defendant resided. The fact that the intervening land belonged to the defendant, neither takes the case out of the letter of the statute, nor tends to avoid the evils which the statute aims to prevent.

[5.] We have no doubt as to the constitutional power of the legislature to pass the law in question. The law may be classed with those police regulations for the prevention of crime, the preservation of peace and good

order, and the security of life and property, the power of enacting which has always been conceded to the State legislature in the absence of some constitutional prohibition.

The judgment of the court below is reversed, and the cause remanded.

MORGAN vs. THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. *Charge on constituents of offense held erroneous.*—A charge to the jury, asserting that “the presenting of a pistol, loaded and cocked, within carrying distance, by one man at another, with his finger on the trigger, in an angry manner, is, of itself, an assault with intent to murder,” is erroneous, because the facts stated do not necessarily raise a legal presumption of the existence of the intent to murder.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. ROBT. DOUGHERTY.

THE bill of exceptions in this case, which shows the only point presented for revision in this court, is as follows:

“On the trial of this case, the State introduced as a witness Solomon B. Serimpshire, the person on whom the alleged assault was committed, and who testified, among other things, that the prisoner came to the door of a house in which he (witness) was, and presented a loaded pistol at him, and told him, ‘that if he would come out of the house he (the prisoner) would shoot him, and that if he did not come out of the house he would shoot him anyhow,’—at the same time presenting the loaded pistol at him. Another witness for the State, one Humphrey Frier, testified, among other things, that he was lying on a bed in the house, and heard the prisoner tell Serimpshire that he would shoot him anyhow; and

that he got off the bed, took the prisoner by the arm, and led him away. There was, also, other evidence in the case. The prisoner asked the court to charge the jury, 'that they must be convinced, beyond all reasonable doubt, that the prisoner intended to shoot Scrimshire, before they can convict the prisoner of an assault with intent to murder.' This charge the court gave, with the additional charge, 'that the presenting of a pistol, loaded and cocked, within carrying distance, by one man at another, with his finger on the trigger, in an angry manner, is, of itself, an assault with intent to murder;' to which additional charge the prisoner excepted."

PUGH & BULLOCK, for the prisoner, cited the following cases: Ogletree v. The State, 28 Ala. 693; Scitz v. The State, 23 Ala. 42; Oliver v. The State, 17 Ala. 587.

P. D. PAGE, for the Attorney-General, *contra*, cited Commonwealth v. York, 9 Metcalf, 93; Wills v. Noyes, 12 Pick. 324; Rex v. Dixon, 3 M. & S. 11; Regina v. St. George, 9 Car. & P. 193; 2 Stark. Ev. 905; 1 Greenleaf, 14; 3 Chitty's Criminal Law, 819; 1 Russell on Crimes, 722; Wharton's Crim. Law, 1279-84; 1 Bishop's Crim. Law, 514; Roscoe, 776; 1 Hale's P. C. 455; Foster's Crown Law, 255; 2 Raymond, 1493; 5 Yerger, 340; 1 Moody's C. C. 263; Russ. & Ry. 207.

STONE, J.—The explanatory charge given by the court in this case, cannot be supported. It ignores one of the material facts which constitute the offense for which the prisoner was on trial. The defendant was not guilty as charged, unless he committed the assault, and this act was done with a special intent to kill and murder the person assaulted. In Ogletree's case, 28 Ala. 693, we said, "The defendant is indicted, not merely for what he has effected, but for what he intended to effect; not only for his act, but for the intent with which he did that act."

The facts of this case were proper for the consideration of the jury; and it was competent for that body in its deliberations, "to act upon those presumptions which are:

recognized by law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence." It does not, however, result as a conclusive presumption of law, from the facts supposed in the charge, that the accused had the intent to take the life of Scrimshire. The surrounding circumstances should have been considered by the jury; and unless the jury were convinced that the prisoner entertained the particular intent to take the life of his adversary, then the prisoner could not be convicted of the higher crime. This particular intent reaches beyond the act done, and is a fact to be found preliminary to conviction, as necessary as the other fact itself, viz., that the *assault* was committed. In other words, while the law permits and commands juries to indulge all reasonable inferences from the facts in proof, it does not, *proprio vigore*, infer the one fact from the other.—See 1 Bish. Crim. Law, § 251.

In *Miller v. The People*, 5 Barbour's Sup. Ct. 203, the defendants were indicted for exposing their bodies to other persons, "intending the morals of divers good and worthy citizens to debauch and corrupt." The evidence tended to prove the exposure of the defendants' persons. The recorder, in charging the jury, said, "The evidence was positive as to the offense charged having been committed; * * * that as to the intent, the acts showed the intent; and if they were proved, that was all that was necessary." The supreme court, in considering that charge, said: "It is a general principle of evidence, that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his act. But when an act, in itself indifferent, becomes criminal if it be done with a particular intent, then the intent must be alleged and proved. The intent in the present case was a material ingredient in the offense, and was a question of fact, under all the circumstances, for the consideration of the jury. * * * The charge withdrew this from the consideration of the jury as a question of fact." The judgment was reversed on the recorder's charge to the jury.

In the case of *Scitz v. The State*, 23 Ala. 42, a question

very similar to the one under discussion was considered. The jury returned a special verdict, finding the defendant "guilty of striking with a loaded whip, calculated to produce death, without any cause or provocation." On this verdict the court pronounced the defendant "guilty in manner and form as charged in the indictment." This court said, "An assault simply with intent to frighten, maim or wound, without producing death, or for the purpose of inflicting punishment or disgrace, is equally consistent with the finding of the jury, as that it was an assault with intent to murder."

So, in this case, an assault with intent to frighten, maim or wound, is consistent with every fact supposed in the charge to the jury. That body could alone judge of the intent, and the court erred in withdrawing that inquiry from their consideration.

Judgment of the circuit court reversed, and cause remanded. Let the prisoner remain in custody, until discharged by due course of law.

OXFORD vs. THE STATE.

[INDICTMENT FOR RECEIVING STOLEN GOODS.]

1. *Sufficiency of verdict.*—Under an indictment charging the defendant, in two separate counts, with larceny and with receiving stolen goods, a verdict of "guilty as charged in the second count of the indictment, to-wit, of receiving stolen goods knowing them to be stolen," is a general verdict, and sufficient to support a conviction under the second count.
2. *Larceny by slave of master's goods.*—A slave may commit larceny by feloniously taking his master's goods.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. ROBERT DOUGHERTY.

THE indictment in this case contained two counts; the first charging the prisoner, Mary Oxford, with the larceny of two hundred pounds of bacon, the personal property

of one Samuel J. Sellers, alleged to have been stolen "from a store-house, dwelling-house, smoke-house, kitchen or shop;" and the second charging that she feloniously received the bacon, then lately stolen, knowing that it had been feloniously taken and carried away. "On the trial," as the bill of exceptions states, "the testimony tended to show, that the bacon was stolen, taken, and carried away by a negro boy, named Dick, the property of Samuel J. Sellers, from whom the bacon was stolen; that it was delivered by said negro to the defendant, and concealed by her. There was, also, other evidence in the case. The prisoner asked the court to charge the jury, 'that if the bacon was stolen, taken, carried away, and delivered to the defendant, by a negro boy who was the property of Samuel J. Sellers, then the defendant is not guilty of the charge in the second count of the indictment—that of receiving stolen bacon knowing it to have been stolen;' which charge the court refused to give, and the defendant excepted."

The verdict of the jury, as set out in the judgment, was, that "they find the defendant guilty as charged in the second count of the indictment, to-wit, of receiving stolen goods knowing them to be stolen;" and the court thereupon sentenced the defendant to three years imprisonment in the penitentiary.

PUGH & BULLOCK, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—1. We think that the verdict sufficiently responds to the indictment. There is an express finding that the defendant is guilty as charged in the second count. What follows was not, we think, intended as a qualification of the preceding part of the verdict, and as limiting the extent to which the defendant was guilty, but as descriptive of the count referred to. Verdicts are not construed strictly, as pleadings are. If the clear meaning of the jury can be collected from the finding, the court will mould the verdict into form, and make it serve. This is not a special, but a general ver-

diet, and "all circumstances which warrant the finding shall be intended."—*Nancy v. The State*, 6 Ala. R. 483; *People v. Caswell*, 21 Wend. 86; *State v. Fuller*, 1 Bay, 245; *Moody v. Keener*, 2 Porter, 233; *Noles v. State*, 24 Ala. 694.

2. So far as the right to hold property is concerned, a slave is not regarded as a person; and whatever he accumulates by his own labor, or is otherwise acquired by him, becomes immediately the property of his master. Hence it is said, that the possession of property by a slave is, by construction of law, the possession of the master. Such, undoubtedly, is the rule where civil rights are involved. But, in the administration of the criminal law, a slave is not regarded merely as property. On the contrary, the courts recognize his existence as a person, his capacity for crime, and his subjection to criminal responsibility. Where a crime has been committed, either by or against a slave, the law, upon high ground of public policy, takes him out of the hands of his master, whose claims of ownership, and the rules of civil right dependent thereon, are for the time forgotten, and the slave becomes a person with well defined rights and liabilities, and is protected and punished as such.—1 Humph. 102. To hold that the rule, which considers a master as constructively in possession of property held by a slave, should be so extended as to absolve the latter from responsibility for crimes, would be a most dangerous perversion of legal principles. It is impossible to deny that a slave can do everything necessary to constitute larceny of his master's goods. He can take the property, without the consent, and against the will of the true owner, with the felonious intent to convert it to his own use. If he cannot commit larceny of his master's goods, neither can he be guilty of robbery as against him, nor of burglary as defined by section 3183 of the Code, if the house broken into belong to his master.

It is a clear rule of law, that where a party has only the bare charge and custody of the goods of another, the legal possession remains in the owner; and the party in custody may be guilty of trespass and larceny, in fraudu-

lently converting the same to his own use. And this rule appears to hold universally in the case of servants, whose possession of their master's goods is the possession of the master himself.—3 Waterman's Archbold, 443, and notes; 2 East's P. C. 566; 2 Bishop's Cr. L. § 730, &c.

There was no error in the refusal of the charge asked. The judgment is affirmed.

MOONEY vs. THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. *Intent as affected by drunkenness.*—Although drunkenness is no excuse for a crime, it may produce a state of mind which would render a party incapable of forming or entertaining the intention which is a material ingredient of the statutory offense of an assault with intent to murder.
2. *Prior assault as defense.*—A prior assault on the prisoner, by the person whom he is alleged to have assaulted, is not necessarily a defense, since the injury inflicted by the prisoner may not have been justified by the necessity of the case, nor proportioned to the injury inflicted on him.
3. *Conviction of less offense than charged in the indictment.*—Under an indictment for an assault with intent to murder, the failure of the prosecution to prove the special intent charged does not necessarily entitle the defendant to an acquittal, since he may nevertheless be convicted of a simple assault and battery.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. ROBERT DOUGHERTY.

THE prisoner in this case, Hawk Mooney, was indicted for an assault on one Isaiah M. Owens, with intent to murder him; pleaded not guilty; was convicted and sentenced to five years imprisonment in the penitentiary. "On the trial," as the bill of exceptions states, "the State proved, that Jeremiah Owens, upon whom the assault was alleged to have been committed, passed along where the prisoner, a youth, was crying, and asked him what was the matter; that the prisoner replied, one — had imposed on him; that said Owens, gently taking

hold of the prisoner, said he would see about it; and that the prisoner thereupon struck him with a knife, inflicting a severe wound upon the chin. It was proved, also, that the prisoner had been drinking, and was very intoxicated at the time said act was done; but that he had once afterwards declared that he had intended to kill said Owens, and expressed regret that he had not succeeded in doing so. It was in evidence, also, that said Owens and the prisoner never had any previous difficulty or bad feelings between them. Upon this state of facts, the prisoner's counsel asked the court to instruct the jury as follows:

"1. That if they believed from the evidence that the defendant, at the time of the commission of the act, was too drunk to form a design to take the life of Owens, then they could not find him guilty of an assault with intent to murder.

"2. That if they believe from the evidence that Owens first assaulted the defendant, by laying hands upon him, then the defendant had the right to repel the assault, and cannot be convicted of an assault on Owens.

"3. That before the defendant can be convicted of an assault with intent to murder, the jury must be satisfied, beyond all reasonable doubt, that he intended to take life; and if they believe from the evidence that he was too much intoxicated at the time to have entertained any such intention, they must find him not guilty."

The court refused each of these charges, and the defendant excepted.

PUGH & BULLOCK, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—The specific intent to commit murder is an essential ingredient of the crime of an assault with intent to commit murder. To a conviction of that crime it is indispensable that the existence of such intent should be proved.—*Ogletree v. The State*, 28 Ala. 693; *Scitz v. The State*, 23 Ala. 42. Drunkenness certainly does not excuse or palliate any offense. But it

may produce a state of mind, in which the accused would be totally incapable of entertaining or forming the positive and particular intent requisite to make out the offense. In such a case, the accused is entitled to an acquittal of the felony, not because of his drunkenness, but because he was in a state of mind, resulting from drunkenness, which affords a negation of one of the facts necessary to his conviction.—Amer. Criminal Law, § 41; Wharton's Law of Homicide, 368; 14 Ohio, 555; *Swan v. The State*, 4 Humph. R. 136; *Pertle v. The State*, 9 Humph. 663; *Pennsylvania v. McFall*, Addison, 255; 1 Baldwin, 514; *Haile v. The State*, 11 Humph. 154.

The decision in *Bullock v. The State*, 13 Ala. 413, was made without detecting the error in the printing of the statute by substituting "attempt" for "intent." That error was not exposed, nor the true reading of the statute declared, until the *State v. Marshall*, 14 Ala. 411, was decided. The reasoning and authorities adduced by the court in the *State v. Bullock* sustain the conclusion which we have expressed.

The court erred in the refusal to give the first charge asked.

[2.] The court committed no error in the refusal of the second charge, because it made a previous assault upon the accused a complete defense, notwithstanding the injury inflicted by the prisoner was out of all proportion to the injury inflicted on him, and not called for by the necessities of the occasion.—Wharton's Am. Crim. Law, 1253, 1258.

[3.] The third charge was also properly refused. The absence of an intent to murder did not, of itself, entitle the accused to a verdict of not guilty. Notwithstanding the jury might have found there was no such intention, he might have been guilty of an assault and battery, and been convicted of it.

The judgment of the circuit court is reversed, and the cause remanded; and the prisoner must remain in custody, until discharged by due course of law.

THE STATE vs. ALLEN.

[SCIRE FACIAS AGAINST BAIL.]

1. *Validity of recognizance.*—A recognizance, taken by a justice of the peace, from a party who is brought before him on a criminal charge, conditioned for the party's appearance, on a day certain, before the said justice, "or some other justice of the peace," is void for uncertainty, when no place is specified for the party's appearance."

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. S. D. HALE.

THIS was a *scire facias* against bail on a forfeited recognizance. The defendants cravedoyer of the recognizance, or undertaking of bail, and demurred to the *scire facias*, on the ground that the recognizance was void for uncertainty. The court sustained the demurrer, and an exception was reserved by the State to its ruling. The material facts of the case are stated in the opinion of the court.

M. A. BALDWIN, Attorney-General, with whom was G. C. WHATLEY, for the State.

JAMES B. MARTIN, *contra*.

STONE, J.—William H. Allen was arrested in Calhoun county, on a criminal charge, and carried before one Turnipseed, a justice of the peace of that county, for examination and commitment. At his instance, the trial was adjourned to a day subsequent, and he entered into bond, with surety, conditioned to appear "before the said Turnipseed, or some other justice of the peace, on the said 21st of this instant." There is nowhere in the bond any mention of the place at which the accused was bound to appear. The record presents the question, is this bond void for uncertainty?

The Code (§ 3396) declares, that "When a defendant is brought before a magistrate for examination, on a war-

rant of arrest, such magistrate may adjourn the examination, from time to time, as may be necessary, not exceeding ten days at one time, without the consent of the defendant, and to the same or a different place in the county; * * * if the offense is not capital, he may give bail in such sum as the magistrate directs, for his appearance for such further examination," &c.

§ 3397. "If the defendant does not appear before the magistrate at the time to which the examination is adjourned, he must certify the default on the undertaking of bail, and return the same to the next circuit court of his county; and the like proceedings must be had thereon as upon the breach of an undertaking in that court; the certificate of the magistrate being presumptive evidence of the default of the defendant."

Section 3398 provides, that if the magistrate who adjourns the examination fails to attend, any other magistrate of the county may preside at the examination, enter and certify the default of the accused, &c.

The right to have a judgment final pronounced on this bond is claimed,—

1st, Under section 2764 of the Code, which declares, that "Justices of the peace must designate certain days, at least once a month, and appoint a particular *place* within their precincts, for the trial of civil causes; but may, in cases of emergency, make their process returnable at any other time or place." The position is, that inasmuch as it is made the duty of justices of the peace to appoint a place for holding their courts, we must presume they perform that duty; and that the legal effect of this bond is, that Allen should appear at the place so appointed by the justice. This position is not sustained by the section of the Code last copied. The *place* within the precinct, which that section commands justices to appoint, is declared to be for the trial of *civil causes*; and there is not the slightest reference made to the trial of criminal prosecutions. The expression found in that section, "for the trial of civil causes," rather negatives the idea, that such appointed place should necessarily be the place where the examination of persons charged with public

offenses should be conducted. "*Inclusio unius est exclusio alterius.*"

It is further contended, that this bond is sufficiently definite, because section 3398 of the Code provides expressly that, in case of the absence of the adjourning magistrate, any other magistrate of the county may attend in his place, and proceed with the examination. The position assumed in this connection is, that the bond is in precise accordance with the terms of the statute.

This position would probably be well taken, if the bond designated any place where the accused should appear. It fails to do so. The accused would have complied with the letter of his bond, if he had, on the day appointed, appeared before any magistrate of the county, if not of the State.

To test the sufficiency of this bond, let us suppose it was taken by a circuit judge, and conditioned to appear before him, or some other circuit judge, without naming the place; or, suppose the condition should be, to appear at some named circuit court, or some other circuit court; certainly such bond would be void for uncertainty.

In the present case, Mr. Turnipseed could not possibly know that the accused did not appear before some other magistrate, and hence he could not with propriety certify that there was a breach of the condition of the bond.

We will not announce what would be our opinion, if the words, "or some other justice of the peace," were omitted from this bond. Possibly there would then be an implied obligation to appear at the place where the bond was taken.

We feel bound to hold the bond in this case void for uncertainty.—*State v. Johnson*, 13 Ohio, 176; *Grigsby v. The State*, 6 Yerger, 354; *State v. Sullivan*, 3 Yerger, 281; *Corbis v. Waddell*, 1 Barb. Sup. Ct. R. 355; *White v. The State*, 5 Yerger, 183; *Park v. The State*, 4 Gray, 329; *Dillingham v. United States*, 2 Wash. Circuit Court Rep. 422.

Judgment of the circuit court affirmed.

STALLINGS *vs.* THE STATE.

[INDICTMENT FOR RETAILING SPIRITUOUS LIQUORS.]

1. *Implied waiver of question not raised in primary court.*—The question, whether a licensed retailer or his clerk is liable to a criminal prosecution for selling spirituous liquors to a person of known intemperate habits, cannot be raised for the first time in the appellate court.
2. *General notoriety admissible to prove knowledge of fact.*—The fact that the intemperate habits of the person to whom the liquor was sold were notorious in the neighborhood in which the defendant lived, is proper evidence for the consideration of the jury in determining whether his habits were known to the defendant.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. WILLIAM M. BROOKS.

THE indictment in this case was in the general form prescribed by the Code. The bill of exceptions is as follows:

“On the trial of this case, there was evidence conducing to prove that the defendant, within twelve months before the finding of the indictment, sold spirituous liquors, as clerk, in the grocery of one Vann, who was a licensed retailer; that the witness was present in the grocery on one occasion, when several persons were present on a *spree*, buying and treating each other; that defendant sold spirituous liquors on that occasion to one Grey, who was one of the crowd on the spree; that one Clifton was behind the counter, as witness believed, assisting the defendant; that one Griffin, who was a drunken sot, called for spirits, but Clifton refused to let him have any, because he was drunk and had enough; and that Grey, who was *tight* at the time, thereupon called for the liquor, and it was handed out to him. There was evidence, also, which conduced to prove Grey a man of known intemperate habits for the last twenty years; that his habits were generally known in the neighborhood to his acquaintances; that the defendant had been raised within two miles

of Grey, and had known him for several years; and that the defendant, on the trial of Clifton, swore that, if Clifton had sold Grey any spirituous liquors, it was by his (defendant's) directions.

“ The defendant asked the court to charge the jury, ‘ that the fact that Grey was *tight* at the time he called for the spirits, was not conclusive evidence that he was a man of known intemperate habits ; and that the fact of such intemperate habits must be brought to the knowledge of the defendant before the time of such selling.’ The court qualified [this charge] by saying, ‘ that it was not conclusive evidence that he was a man of known intemperate habits ; but that if Grey was a man of known intemperate habits for the last twenty years, and if his said habits were generally known to his acquaintances, and if the defendant had been raised and always lived within two miles of him, and was acquainted with him, the jury might consider the evidence that Grey was intoxicated on that occasion, in connection with the other evidence in the cause, in determining the guilt or innocence of the defendant, in connection with the fact that it was notorious in the neighborhood for twenty years that Grey was a man of intemperate habits, and that the defendant had been raised within two miles of him.’ To this charge the defendant excepted, and asked the court to charge the jury, ‘ that if Clifton, and not the defendant, sold and delivered the liquor to Grey, then the defendant was not guilty ; ’ which charge the court refused to give, and the defendant excepted.”

JAMES B. MARTIN, for the appellant.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—No question was made in the court below, as to whether a licensed retailer or his clerk is liable to a criminal prosecution for selling spirituous liquors to a man of known intemperate habits. The appellant cannot now raise the question in this court, and it is therefore neither necessary nor proper for us to consider it.

[2.] The effect of the charge of the court was to authorize the jury to look to the fact that Grey's intemperate habits were notorious in the neighborhood in which the defendant lived, as evidence proper to be considered by them, in connection with the other facts referred to, in determining the question whether the defendant knew that Grey was a person of intemperate habits.

Under the authority of the decision made by this court in *Price v. Mazange & Co.*, 31 Ala. 701, we hold that there was no error in this charge. In the case referred to, the question of the admissibility of such evidence, for the purpose of bringing home to a party notice of a fact, was carefully considered; and we do not doubt the correctness of the result then attained. In the previous case of *Stanley & Elliott v. The State*, 26 Ala. 26, the familiar distinction between the relevancy and the sufficiency of evidence seems to have been overlooked; and while we concur in the opinion expressed in that case, that the knowledge of an individual as to a particular fact cannot, as matter of law, be inferred from the mere circumstance that it is generally known in his neighborhood, we feel equally as well satisfied, that if a fact is notorious in a neighborhood, this is a circumstance tending to show notice of the fact to a person residing there; and it is therefore relevant testimony for that purpose. In other words, it is not a legal presumption that every fact which is notorious among a man's neighbors is known to him; but the existence of the fact being first shown, its notoriety in a particular neighborhood tends to show, and when coupled with other evidence might induce the belief, that a person residing there had knowledge of it.—*Price v. Mazange & Co.*, *supra*; *Cook v. Parham*, 24 Ala. 21; *Ward v. Hernndon*, 5 Porter, 382; *Lawson v. Orear*, 7 Ala. 784; *Bank v. Parker*, 5 Ala. 731; 1 Greenl. Evidence, § 138, note; *Brander v. Ferridy*, 16 Louisa. 296; *Bartlett v. Decreet*, 4 Gray, 111.

In several cases decided in this court, it is held, that where a witness has been so situated, that if a fact, notorious and ostensible in its character, ever existed, he would probably have known it, his want of knowledge is

some evidence, though slight, that it did not exist. *Thomas v. Degraffenreid*, 17 Ala. 602; *Nelson v. Iverson*, 24 Ala. 9; *Crow v. Blakey*, at this term. It is obvious, that the principle on which these decisions rest is, that if the existence of a fact is shown, and it is also proved that a party was in a situation and had opportunities to know of it, this is evidence tending to prove that he did know of it. The rule is, that evidence having any tendency, however slight, to prove a particular fact, is competent to be submitted to the jury to show that fact.—*Eaton v. Welton*, 32 N. H. 352.

The judgment of the circuit court is affirmed.

REDMAN vs. THE STATE.

[INDICTMENT FOR HORSE-RACING IN A PUBLIC ROAD.]

1. *Horse-racing indictable and punishable as misdemeanor.*—Horse-racing in a public road, which is declared a misdemeanor by section 1180 of the Code, is an indictable offense, and punishable as a misdemeanor at common law, no punishment being prescribed by the statute.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. ROBERT DOUGHERTY.

THE indictment in this case charged, “that R. A. Redman and John Hicks did unlawfully engage in a horse-race along a public road in said county.” After conviction, the defendant Redman moved in arrest of judgment, on the ground that, “although the statute makes horse-racing along a public road a misdemeanor, it fails to provide any punishment therefor; and as it is a purely statutory offense, the statute alone can be looked to for the punishment of it.” The court overruled the motion, and rendered judgment against the defendant for the amount of the fine assessed by the jury, together with the costs; to which the defendant excepted.

PUGH & BULLOCK, for the appellant.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—Section 1180 of the Code declares it to be a *misdemeanor* for any person to engage in any horse-race along or across any public road; and section 3074 expressly prescribes, that *misdemeanors* are, unless some other express provision is made by law, indictable offenses. The Code does not prescribe any punishment for the offense of horse-racing along or across the public road; and it is argued, that because no punishment is annexed to the offense, none can be inflicted upon the accused. We do not so understand the law. The authorities fully sustain the proposition, that where the statute prohibits an act, and declares it a misdemeanor, the offense is indictable, and punishable as a common-law misdemeanor.—Code, § 3301; 1 Bishop on Cr. L. § 349; 1 Archbold, 2.

The judgment of the court below is affirmed.

CARTER vs. THE STATE.

[INDICTMENT FOR GAMING.]

1. *Charge invading province of jury*.—A charge to the jury, instructing them “that the testimony of a man who was asleep a part of the time, and who contradicted another witness on the question of the defendant’s playing, should have no weight with them,” is an invasion of the province of the jury.
2. *Same*.—A charge which makes the defendant’s guilt or innocence depend on what one witness *proved*, instead of facts to be found by the jury from the whole evidence, is obnoxious to the same objection.

APPEAL from the Circuit Court of Bibb.

Tried before the Hon. PORTER KING.

"On the trial of this case," as the bill of exceptions states, "the State proved, by one Glass, that he, with the defendant and two other persons, played one or two games at cards, in the jail of said county, at the fall term of said court, 1856; and that they commenced dealing the cards for another game. The defendant introduced evidence tending to show that he did not play any game at that time and place, but sat down to play the game last spoken of by the witness Glass. One of said witnesses testified, that he did not see the defendant play at that time and place; and that he was there all the time, and fell into a doze of sleep. The defendant's evidence tended to show, that he sat down to play a game, and that the cards were being dealt out in order to play, when the sheriff came into the jail before the dealing was finished, and took up the cards, and threw them into the fire.

"On this evidence, which is the substance of all the proof in the case, the court charged the jury, 'that the dealing out of the cards was not playing at cards; but, if Glass proved that the defendant did play one or two games at the jail of the county of Bibb, within twelve months before the indictment was found, then he was guilty; and that the evidence of a man who was asleep a part of the time, and who had contradicted the witness Glass on the question of the defendant's playing, should have no weight with them;' to which charge the defendant excepted."

BYRD & MORGAN, for the appellant.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—That part of the charge which declares, "that the evidence of a man who was asleep a part of the time, who contradicted the witness Glass on the question of the playing of the defendant, should have no weight with" the jury, cannot be upheld. • It was an invasion of the province of the jury, who are alone the judges of the credibility and weight of the evidence. This testimony **may** have been weak, but it was the defendant's right to have it weighed by the jury.—Corley v. The State, 28 Ala.

22; Brown v. Mayor of Mobile, 23 Ala. 722; Hair v. Little, 28 Ala. 236.

[2.] Another part of the charge is in the following language: "If Glass proved that the defendant did play one or two games at the jail of the county of Bibb, within twelve months before the indictment was found, then he was guilty." This language is probably objectionable in this, that it makes the guilt of the defendant depend on what Glass *proved*, when it should depend on *facts* to be found by the jury upon the whole evidence.

The judgment of the circuit court is reversed, and the cause remanded.

DALY vs. THE STATE.

[INDICTMENT FOR RETAILING SPIRITUOUS LIQUORS.]

1. *Selling liquor drunk on or about the premises.*—It being shown that the liquor sold by the defendant was drunk "in an alley, five or six feet wide, which led from the main street between his house and that of an adjoining proprietor; that the defendant had no control whatever over said alley, nor could he see drinking carried on there from his front door; that it did not lead into his back yard, nor was there any window opening from his storehouse into it,"—these facts alone, without explanation or addition, do not authorize the court to assert, as matter of law, in its charge to the jury, that the place where the liquor was drunk was *about* the defendant's premises.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. PORTER KING.

"On the trial of this case," as the bill of exceptions recites, "the State introduced as a witness one Wiley Hawkins, who testified, that the defendant kept a house in the town of Eutaw where spirituous liquors were sold; that he, (witness,) within twelve months before the finding of the indictment, frequently bought whiskey from the defendant by the quart; that said liquor, on divers occasions, was drunk in an alley, five or six feet wide,

which led from the main street between the defendant's house and that of one Hart; that the defendant had no control whatever over said alley, nor could he see drinking carried on there from his front door; that said alley did not lead into his back yard, nor was there any window opening from his store-house into said alley; that said liquor was delivered by the defendant in bottles; that he (witness) did not know whether or not the defendant ever saw him or others drinking in said alley; and that the defendant frequently told him and others who bought from him, that they must not drink on or about his premises.

"This was all the evidence in the cause; and thereupon the court charged the jury, 'that if they believed from the evidence, beyond a reasonable doubt, that the defendant, within twelve months before the finding of the indictment, and within said county of Greene, sold spirituous or vinous liquors by the quart, and that the same was drunk on or about his premises, they must find him guilty.' The defendant excepted to this charge, and requested the following written charge: 'That the proof must be such as to satisfy the jury that the defendant knew, or had reason to believe, at the time of the sale of said liquor, that the same would be drunk in said alley, or on or about his premises;' which charge the court refused to give, and the defendant excepted.

"After the jury had retired, and been absent for some time, they returned into court, and asked for a definition of the word *about*; and the court thereupon instructed them in these words: 'To relieve you, gentlemen, of further difficulty as to the meaning of the word *about*, I charge you, that the alley, as spoken of by the witness, was about the defendant's premises.' To this charge, also, the defendant excepted."

JOHN G. PIERCE, for the appellant.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—When, in reply to the inquiry of the jury as to the meaning of the word "about," the

court charged them that "the alley, as spoken of by the witness, was *about* the premises," this, when considered in connection with the evidence, all of which is set out in the bill of exceptions, was tantamount to a charge, that the place where the liquor was drunk, as described by the witness, was within the prohibition of the statute; and so it must have been understood by the jury. How far the alley spoken of extended; to what distance the liquor was carried by the buyer before he drank it; whether the place of drinking was in view of the seller or of his premises, are all facts proper to be considered in determining whether the drinking took place about the premises. The bill of exceptions is silent upon all these points. And we cannot assert, as matter of law, that, on the facts disclosed, without explanation or addition, the place was *about* the premises within the meaning of the Code. The court below did, as we have seen, announce that as a conclusion of law from the evidence. In so doing it erred.—Easterling v. The State, 30 Ala. 46.

The judgment is reversed, and the cause remanded.

HAWKINS vs. THE STATE.

[INDICTMENT FOR GAMING.]

1. *Raffling*.—A conviction cannot be had under an indictment for gaming, (Code, § 3243,) on proof that the defendant took a chance in a raffle regularly licensed and paid for.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. PORTER KING.

THE defendant in this case was indicted for gaming, and, on his trial, reserved the following bill of exceptions to the rulings of the presiding judge:

"The State proved, that one Whetstone, within twelve

months before the finding of the indictment, and in the county of Autauga, put up a small, fancy work-box, which he had for sale at his store, to be disposed of by a raffle; that the chances in the raffle were taken by several persons who were present, at one dollar per chance, and, amongst the number, by the defendant, who took one chance; that the raffle was conducted with dice, the party throwing the highest number with three dice being the winner; and that dice were the instruments most generally used in raffling. The proof further showed, that the tax assessed by law on the amount of said raffling had been assessed against, and paid by said Whetstone, pursuant to law. This was all the evidence in the cause; and thereupon the court instructed the jury, 'that if they believed all the evidence to be true, they must find the defendant guilty;' to which charge the defendant excepted."

WATTS, JUDGE & JACKSON, for the appellant.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—The judgment in this case is reversed, and the cause remanded, on the authority of the following cases: Darling Jones v. The State, 26 Ala. 155; Allaire v. The State, 14 Ala. 435; Mosely v. The State, 14 Ala. 390.

COLLINS vs. THE STATE.

[INDICTMENT FOR RECEIVING STOLEN GOODS.]

1. *Charge on guilty knowledge as constituent of offense.*—A charge to the jury, instructing them, in effect, that if the prisoner received the stolen goods under such circumstances that any reasonable man of ordinary observation would have known that they were stolen, and concealed them, then they were authorized to find that he knew they had been stolen, asserts a correct legal proposition.

2. Practice in giving further instructions to jury in absence of prisoner's counsel.

The presiding judge having quit the bench, on finishing the business of the day, while the jury in a criminal case were deliberating on their verdict; and the counsel engaged in the case having left the court-room, under an agreement that the clerk might receive the verdict of the jury,—the fact that the court, on the request of the jury for further instructions, afterwards gave them an additional charge, which asserted a correct legal proposition, in the presence of the prisoner himself, but in the absence of his counsel, and without their knowledge or consent, is not an error which will work a reversal of the judgment.

APPEAL from the City Court at Mobile.

Tried before the Hon. ALEX. McKINSTRY.

THE prisoner, George Collins, was indicted for receiving stolen goods, the personal property of one Anderson, knowing them to be stolen; was convicted, and sentenced to three years imprisonment in the penitentiary. During his trial, he reserved the following exceptions to the rulings of the presiding judge:

“The State proved, that one Moses Anderson, before the finding of the indictment, lost from his store-house certain articles of property, amongst which were those mentioned in the indictment, and which the evidence tended to prove had been stolen; that afterwards the prisoner, being suspected and accused by a policeman of having a portion of said property in his possession, at first denied the fact, but, immediately afterwards, under threats of being carried to the guard-house, admitted the possession, and produced the articles mentioned in the indictment,—remarking that one Parker had his share. The defendant then proved, by one Rose, that the property mentioned in the indictment and found in his possession, together with other new articles of considerable value, were accidentally discovered by him (Rose) under an old house in the city of Mobile; that he thereupon called the defendant, and showed them to him, when he (defendant) remarked that they were just such articles as he wanted; and that they thereupon jointly took the property so discovered, and carried it away,—among the rest the articles mentioned in the indictment.

“This was all the evidence in the case, in reference to

the question to the court and the reply thereto hereinafter set forth, as to the guilty knowledge. After argument of counsel, the court charged the jury, and they retired to consider of their verdict. Before the jury returned, the business for the day being concluded, the solicitor and the prisoner's attorney, in the presence, and with the approbation of the court, consented that the clerk should receive the verdict. The judge of the court, and the members of the bar, then retired from the court-room for the day; and the prisoner's counsel, having no reason to suspect or believe that any further business would be done by the court during that day, or any further instructions be given to the jury in said cause, [also left the court-room.] The jury sent for the judge, and were brought into court; and the court, in answer to an inquiry in writing by them, and in the presence of the prisoner, but in the absence of his counsel, and without their knowledge or consent, (the prisoner not being called upon to assent thereto, and not assenting,) charged the jury as follows: 'The jury state that they find that the goods were stolen, and ask, if they were received and concealed by the defendant under such circumstances that any reasonable man of ordinary observation would have known that they were stolen, and if the defendant knew of those circumstances, whether they are authorized to find that he knew of it; and the judge replied, yes.' To the fact of the court's having done this in the absence of the prisoner's counsel, under the circumstances hereinabove stated, as well as to the charge itself so given, the prisoner, by his counsel, excepted."

H. F. DRUMMOND, for the appellant.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—The charge of the court, to which objection is here urged, throwing it into the form of a charge given, may be thus stated, without doing violence to any of its terms:

"If you find the goods had been stolen, then, on the question of knowledge, I charge you that, if you find the

defendant received and concealed the goods, and received them under such circumstances that any reasonable man of ordinary observation would have known that they were stolen; and if you find that the defendant knew of those circumstances, then you are authorized to find that the defendant knew they had been stolen."

It will be observed, that this charge presents no question on what facts are necessary to constitute a larceny; nor does it undertake to define the constituent elements of a felonious *receiving* under the statute.—Code, § 3178. Its whole force is expended on the question of knowledge.

In further criticism of this charge, we may remark, it does not command or direct the jury to find *knowledge*, if they found the supposed facts. That would have been an invasion of their province. It simply instructed that body, that if the specified facts existed, they were authorized—permitted—had authority—to find the fact of knowledge.

Knowledge of the theft, as an element of the offense denounced by section 3178, could rarely be the subject of direct proof. Like most other facts, it may be inferred from other sufficient facts and circumstances. In criminal trials, the jury are charged with the ascertainment of the facts, and, in doing so, are permitted to draw all reasonable and satisfactory inferences.—See *Rosenbaum v. The State*, at the present term. The charge asserted a correct legal proposition.—*Morgan v. The State*, at the present term; *Ogletree v. The State*, 28 Ala. 693; *Rosc. Cr. Ev.* 875; *McGehee v. Gindrat*, 20 Ala. 95; *Centre v. P. & M. Bank*, 22 Ala. 743; *Burns v. Taylor*, 23 Ala. 255; *Brewer v. Brewer*, 19 Ala. Rep. 482; *Bradford v. Harper*, 25 Ala. R. 337; *Garrett v. Lyle*, 27 Ala. R. 586; *Regina v. Smith*, 33 Law & Eq. Rep. 531.

[2.] The record informs us, that after the jury had been charged, and had retired, the court, having finished the business of the day, withdrew from the bench; and that the counsel for the prosecution and defense, having agreed that the clerk might receive the verdict, left the courtroom; that subsequently, the jury having sent for the

judge, he, in answer to a written request by them, gave them the charge which we have been considering. This, we are informed by the record, was done in the courtroom, and in the presence of the prisoner; but "in the absence, and without the knowledge or consent of the counsel for the accused." This matter is here assigned for error.

It will be observed, that the only ground of exception to this action of the court is, that it was done *in the absence* of the counsel, and without his *knowledge* and *consent*. Construing this language literally, it does not affirm that the counsel was not called, or sent for. In laying down a rule for the government of cases, such as this, we can only assert principles which will apply alike to all cases similarly circumstanced. Counsel might be beyond the reach of the court, or, it is conceivable, may abandon the defense. We find nothing in this record which affirms such to have been this case; yet the record does not show that the prisoner's counsel could have been brought to the court, when the jury desired further instructions. To deny to the court, in general terms, the right to give to the jury further or explanatory charges in the absence of the counsel, might leave the court, the jury, and the administration of the criminal law, at the mercy of persons over whose movements the court could exert no control; or, within the arbitrament of accidents, against which no human vigilance could provide. To lay down such a rule, might lead to the most embarrassing results; and in cases, not without the pale of supposition, might result in a total denial of justice.

While we concede the unqualified right of the accused "to be heard by himself and counsel;" that this right extends beyond the examination of witnesses, the discussions of law and the testimony, and embraces every important order made, or proceeding had; still we think that, in the mere incidents or accidents of the trial, something must be conceded to the exercise of a just and enlightened judicial discretion. In giving a new or explanatory charge, or in repeating a former charge, courts should, and doubtless would, give counsel the priv-

ilege of being present, by having them called, or, if within reach, sent for. We think, however, that when counsel have voluntarily absented themselves from the court-room, under an agreement that the clerk may receive the verdict; it is not an error for which we should reverse, that the court afterwards, the prisoner being present, at the instance and request of the jury, gave them a charge, which is unexceptionable as a legal proposition, merely because this was done in the absence, and without the knowledge or consent of the prisoner's counsel.

We need not, and do not, announce what would be our opinion, if the record informed us that the counsel, on leaving the court-room, requested to be called or notified, should further action in the case become necessary; or that the counsel were within reach, and were not called. That case is not presented by this record, nor is it probable it will arise.

The judgment of the city court is affirmed, and its sentence must be executed.

CANTALINE vs. THE STATE.

[SCIRE FACIAS AGAINST BAIL ON FORFEITED RECOGNIZANCE.]

1. *Presumption in favor of judgment.*—Where the judgment final, in *scire facias* against bail, recites the issue and return of an *alias scire facias*, but the *alias* itself is not set out in the transcript, the appellate court will presume that the recitals are true, and that the *alias* has been lost.
2. *Issue and return of alias scire facias.*—Where the judgment final recites the issue of an *alias scire facias*, returnable to the term at which said judgment was rendered, which was the term next after that at which the original *scire facias* was returned, and its return not found, this is sufficient to support the judgment final, although the *alias writ* is not set out in the record, and the date of its issue is left blank in the judgment.
3. *Sufficiency of judgment in describing and identifying case.*—A judgment *nisi* in the form prescribed by the Code, (§ 3691,) to which is prefixed the name of the case, with a description of the offense charged, and which recites that the recognizance was conditioned for the principal defendant's appearance "to answer in this case," sufficiently describes and identifies the case.

4. *When recognizance forms no part of record.*—A recognizance, copied into the transcript by the clerk, but not made part of the record by exceptions or appropriate reference, cannot be looked to as a part of the record of the proceedings against bail on their forfeited undertaking.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. S. D. HALE.

THIS was a proceeding by *scire facias* on a forfeited recognizance. The facts shown by the record are these: At the September term, 1855, of the circuit court of Pike county, on change of venue from Covington county, Henry Cantalline entered into a recognizance, with Jeremiah Cantalline and Lewis Carnley as his sureties, conditioned to "pay the State of Alabama \$300, if the said Henry Cantalline fails to appear at the next term of said court, and from term to term thereafter until discharged by law, to answer an indictment against him for larceny." At the ensuing March term, 1856, on the defendant's failure to appear, a judgment *nisi* was rendered against him and his sureties. On this judgment a *scire facias* was issued on the 30th April, 1856, which was returned by the sheriff, on the 16th September following, "not found." At the September term, 1856, the only entry in the cause set out in the transcript is in these words, "Continued generally." At the March term, 1857, the following judgment was rendered:

<p>"The State vs. Henry Cantalline, Jeremiah Cantalline, Lewis Carnley.</p>	}	<p>On this 24th day of March, 1857, came M. A. Baldwin, attorney-general; and the defendants, being called, came not. And it appearing that, at the spring term of this court, 1856, judgment <i>nisi</i> was rendered against the defendants, in favor of the State of Alabama, for the use of Pike county, for the sum of \$300, because of the failure of the defendant Henry Cantalline to appear at said term to answer to an indictment then pending in said court against him, for the offense of grand larceny; the said Henry, as principal, and the said Lewis and Jeremiah, as his sureties, being legally bound for the appearance of said Henry at said term to answer said indictment, in the sum of \$300;</p>
---	---	---

and it further appearing to the court, that a writ of *scire facias* was regularly issued to the said defendants, on the 31st April, 1856, requiring them to appear at the next term of said court thereafter, to show cause why said judgment should not be made absolute, which was returned by the sheriff of said county 'not found;' and it appearing that an *alias* writ of *scire facias* was, in like manner, on the — day of —, 185—, issued to the said defendants, requiring them to appear at the present term of the court, to show cause why said judgment should not be made absolute, and was, in like manner, returned 'not found:' It is thereupon considered by the court, that the said judgment be made absolute, and that the State of Alabama, for the use of Pike county, recover of the defendants the said sum of \$300, together with the costs in this behalf expended," &c.

The errors assigned are: "1st, taking final judgment on the bond, previous to the issue and return of two writs of *scire facias*; 2d, the failure of the record to describe and identify sufficiently the indictment upon which the judgment was entered up."

H. W. HILLIARD, for the appellants.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—The assignments of error in this case are, the rendition of a final judgment "previous to the issuance and return of two writs of *scire facias*," and "the failure of the record to describe and identify sufficiently the indictment" which the accused was bound to appear and answer.

The judgment final recites the issue of a *scire facias* on the 30th April, 1856, and the return of "not found" upon it. It then proceeds to state, "that an *alias* writ of *scire facias* was, in like manner, on the — day of —, 185—, issued to the said defendants, requiring them to appear at the present term of the court, to show cause why said judgment" (the judgment *nisi*) "should not be made absolute; and was, in like manner, returned not found." The first named *scire facias*, issued in April,

1856, with the endorsement by the sheriff of 'not found' on the 16th April, 1856, is set out in the transcript. The second *scire facias* mentioned in the judgment final is not found in the transcript. It is contended that the *scire facias* itself, with the requisite return of 'not found,' is an indispensable part of the record, and that the judgment final cannot be maintained on error in its absence. If the recital of the judgment entry speaks the truth, there was a second *scire facias*, which was returned 'not found.' Are we to presume that there was no *scire facias* with the requisite return, because one is not found in the record, and that the recital of the judgment is false; or are we not rather to presume that the recital of the record is true, and that the *scire facias* has been lost? The principle which imputes absolute verity to records, and the decisions of this court upon kindred questions, compel us to decide, that we must presume the *scire facias* to have been issued and returned, as stated in the judgment entry, and that it has been lost.—*Castleberry v. Pierce*, 2 S. & P. 141; *Wade v. Killough*, 3 S. & P. 434; *Lucas v. Hitchcock*, 2 Ala. 357; *Bancroft v. Stanton*, 7 Ala. 351; *Eastland v. Sparks*, 22 Ala. 607; *Phillips v. Kelly*, 29 Ala. 628; *Allen v. Harper*, 26 Ala. 686; *Kirkley v. Segar*, 20 Ala. 226.

[2.] But it is argued, that, conceding to the recitals of the judgment entry that they are absolutely true, they fail to show the second issue of a *scire facias*, and its return 'not found.' The *scire facias* appears from the recital to have been an *alias*, and to have been returnable to the term at which the judgment final was rendered. The fact that it was an *alias* shows that it was the second *scire facias* issued in the case, (see *Sellers & Cook v. Hayes*, 17 Ala. 749;) and the fact that it was returnable at the term when the judgment final was rendered, shows that it was returnable at the term next after that to which the first *scire facias* was returned, for it appears that the first *scire facias* was returned at the term next preceding that at which the judgment final was rendered. We thus ascertain from the judgment entry, that there was a second *scire facias*, which was issued after the return of the first,

and to the next succeeding term. This being the case, it can make no difference that the blanks leave the date of the *scire facias* in obscurity. The statute does not require that the precise date should be shown. The second *scire facias* is shown by the record to have been returned, in like manner with the first, "not found."—Otey v. Moore, 17 Ala. 280.

[3.] The second assignment of error is not well taken. The judgment *nisi* is preceded by a description of a case against Henry Cantaline for grand larceny. It is stated in the judgment *nisi*, that the agreement of the accused and his sureties was for his appearance to answer "in this case for grand larceny." It is thus shown that there was a prosecution for grand larceny, and that the recognizance had reference to that prosecution. Aside from the clear designation and identification of the offense, the judgment *nisi* is in strict accordance with the form prescribed by the Code.—Code, § 3691. There is, therefore, an express statutory affirmance of the sufficiency of the judgment *nisi* in every particular.

[4.] There is a recognizance copied into the transcript, which, it is contended, is variant from that described in the judgment *nisi*; but it is settled that we cannot look to that as a part of the record in this case.—Richardson v. The State, 31 Ala. 347.

The judgment of the court below is affirmed.

SAVAGE'S ADM'R vs. CARLETON.

[ACTION AGAINST SURETY ON PROMISSORY NOTE.]

1. *Notice to creditor to sue principal*.—A letter, written by the surety to the creditor, containing this language, "I am desirous that you should bring suit on M.'s note, on which I am surety, and would prefer that you enter suit in this county, early in August, so that the principal would not have the same time to dodge," is not such a notice to sue (Code, § 2647) as will discharge the surety if the creditor fails to sue as requested.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by James C. Savage, as the administrator *de bonis non* of James Savage, deceased, against Alexander Carleton; and was commenced on the 1st March, 1858. The cause of action was a promissory note for \$860, executed by the defendant and one John E. Macon, (the former as surety for the latter,) dated the 13th February, 1854, and payable twelve months after date, to A. M. Creagh, as the administrator of said James Savage, deceased. The defendant pleaded, "that he is surety on said note, and is released from all liability thereon by having given the notice required by section 2647 of the Code." The case was tried on the following agreed facts:

"J. E. Macon is the principal in the note sued on, and the defendant is his surety thereon. During the year 1856, R. C. Torrey was the administrator *de bonis non* of the estate of the said James Savage, deceased, and, as such, was the owner and holder of the said note. About the 23d June, 1856, said Torrey received by mail from the defendant a letter, dated the 16th June, 1856, as follows:

"Dear Sir: I am desirous that you should bring suit on J. E. Macon's note, on which I am security, to A. M. Creagh, administrator of J. Savage's estate, due about January, 1854, for somewhere about \$860 when given, before any payments were made. I should prefer that you would enter suit early in August, in Clarke county, so that the principal could not have the same time to dodge. You might then obtain judgment in Clarke county, so that yours would be older than judgments obtained in Marengo.'

"To this the owner of the note, said Torrey, on the 2d July, 1856, replied in the following letter:

"Dear Sir: I have received yours of the 16th June, in reference to Macon's note for \$860. He paid me \$400 last court, and said he would pay the balance when I insisted on it; but would prefer that I should wait

awhile. I will send a complaint, &c., and get him to accept service. Are his creditors pushing him in Marengo ?'

"At this time the defendant resided in Clarke county, and said Macon in Marengo county. Torrey did not bring suit to the next term of the circuit court of either Clarke or Marengo county, although the time was ample therefor."

"Thereupon the court charged the jury, that the notice sent by the defendant to Torrey, in June, 1856, as set forth in the agreed statement of facts, was sufficient to discharge the defendant from all liability as surety on the note, suit not having been brought to the first court thereafter ; it being admitted that said Macon was in Marengo county, and could have been sued to the first court after the notice."

The charge of the court, to which the plaintiff excepted, is the only matter assigned as error.

R. C. TORREY, for the appellant.

WILLIAM BOYLES, *contra*.

RICE, C. J.—If the charge of the court can be sustained at all, it must be by virtue of section 2647 of the Code, which provides, that "a surety upon any contract for the payment of money, or for the payment or delivery of personal property, may *require* the creditor, or any one having the beneficial interest in the contract, by notice in writing, *to bring suit thereon against the principal debtor, or against any co-surety* to such contract ; and if suit be not brought thereon, *pursuant to such notice*, to the first court to which suit can be brought after the receipt of *such notice*, and prosecuted with diligence according to the ordinary course of law, the surety giving *such notice* is discharged from all liability as surety, or his aliquot proportion of the debt, as the case may be. One surety may give the notice in behalf of his co-sureties."

The notice relied on to discharge the surety in the case at bar, is not "such notice" as is prescribed in the section of the Code above quoted. It is not a notice to the

creditor "*to bring suit*" on the note against the principal, or against a surety. It contains no language which can be fairly construed into a *demand or requisition* on the part of the surety, that suit *should be brought* on the note. It does not convey the idea that the surety is therein asserting a *right* to have suit brought on the note, but amounts, at most, only to the expression of his *desire* and *preference* that the creditor should sue on the note. A mere expression by a surety of his *desire* and *preference* that suit should be brought on a note, is not "a notice in writing *to bring suit* thereon," within the meaning of section 2647 of the Code.—*Shehan v. Hampton*, 8 Ala. 942.

The court below, in its charge, gave an effect to the notice relied on by the surety to which it was not entitled; and for that error, its judgment is reversed, and the cause remanded.

FARMER vs. WILSON.

[MOTION TO DISMISS APPEAL.]

1. *Amendment of judgment nunc pro tunc pending appeal.*—When a judgment is amended *nunc pro tunc*, after an appeal has been sued out, by the addition of another party defendant, the amendment will be considered as relating back to the date of the original judgment, for the purpose of bringing up the entire case with the new party, but not for the purpose of defeating the appeal on account of the want of proper parties, or a misdescription of the judgment in the appeal bond.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. JOHN E. MOORE.

THE facts of this case, so far as they have any bearing on the motion to dismiss the appeal, are stated in the opinion of the court.

R. W. WALKER, for the motion.

JOHN S. & E. W. KENNEDY, *contra*.

WALKER, J.—At the April term of the court below, 1858, a judgment was rendered against the appellant. At the fall term, 1858, the judgment was amended *nunc pro tunc*, so as to embrace an additional party defendant. During the interval between the rendition of the judgment and its amendment, the appellant obtained an appeal to this court in his own name, describing the judgment as one against himself alone. A motion is now made to dismiss the appeal, upon the ground, that the amendment *nunc pro tunc* has relation back to the date of the original judgment; that therefore the party defendant embraced in the judgment by the amendment *nunc pro tunc* was, by intendment of law, a defendant from the date of the judgment; and that the appeal was improperly taken in the name of the appellant alone, and the judgment improperly described as being against the appellant alone.

This court said, in *Pearson v. Darrington*, 21 Ala. 169, that “the doctrine of relation back to a former period, is a fiction, which is often indulged in advancement of justice to sustain legal proceedings; but it is never resorted to, when the result would be to deprive a party of a clear legal right, or when it would work manifest injustice.” To allow the doctrine of relation the operation sought by the motion, would deprive the appellant of a clear legal right, and would work manifest injustice. As soon as the judgment was rendered, there was a “*final judgment*” of the circuit court against him; and from that he had a right to appeal, by virtue of section 3016 of the Code; and that right he exercised in taking the appeal. Looking at the judgment as it stood at the time the appeal was taken in the name of the proper party, the judgment was correctly described. The doctrine of relation, as invoked, would take away from the appellant his appeal, to which he had under the law a right, and which he had obtained in pursuance to the law. Besides, the most gross and irremediable injustice might result, if the amendment should defeat the appeal. For it would be in the power of the appellee to destroy an appeal, when the statute of limitations had perfected a bar to another appeal.

The appeal, taken by the single and sole defendant, must be regarded as bringing up the entire case; not merely as it stood when the appeal was taken, but as it stood after the amendment *nunc pro tunc*. To allow the amendment to relate back, so as to regard it as a part of the case when the appeal was taken, *for the purpose of embracing it with the matter brought up by the appeal* under the revising power of this court, is not inconsistent with a denial of its relation back *for the purpose of defeating the appeal*. The doctrine of relation, when it operates to bring the amendment within the scope of the appeal, takes away no right, does no injustice, and provides a convenient practice, promoting an easy administration of justice. On the other hand, to allow the doctrine to defeat a subsisting appeal, would, as we have seen, take away a right, and effect the grossest injustice.

The appeal must necessarily bring the entire case, including the amendment, before this court. That it does, has been several times decided by this court, in reference to amendments not bringing in an additional party.—Cunningham v. Fontaine, 25 Ala. 644, and cases therein cited. The same principle must prevail as to the amendment in this case, which adds a party defendant; otherwise, there might be different appeals by the different defendants. The rule, repeatedly recognized by this court, is, that an appeal cannot be taken in the name of one of several defendants, but must be taken in the name of all.—See the cases collected in Shepherd's Digest, 563, §§ 10 and 11. To the general rule prescribed by those decisions, which we have no disposition to disturb, this case must necessarily constitute an exception. They apply to cases where the parties are upon the record when the appeal is taken. They cannot apply to this case, where a co-defendant is actually brought into the judgment by an amendment *nunc pro tunc* after the appeal is taken. To require a defendant to anticipate a motion to amend *nunc pro tunc* by his adversary, would be to exact an impossibility. If the appeal should be sued out, after an amendment *nunc pro tunc* bringing in an additional defendant, it would, of course, be necessary that the

appeal should be taken in the name of all the defendants. *Dumas v. Hunter*, 30 Ala. 188.

If the appeal had been taken by the appellant, in the name of himself and co-defendant, a summons and severance would have been the proper course if the co-defendant was unwilling to join in the assignment of errors.—*Savage & Darrington v. Walsh & Emanuel*, 24 Ala. Rep. 293; *Moore v. McGuire*, 26 Ala. 461.

In analogy to that rule, if the defendant brought in by the amendment, does not come in, and join in the assignment of errors, there must be a summons and severance.

No difficulty under this decision grows out of the fact, that there may be two appellants, only one of whom has given bond. Precisely the same thing occurs, when one defendant takes the appeal in the name of himself and his co-defendants.—*Moore v. McGuire*, *supra*.

The motion to dismiss the appeal is overruled.

EVANS vs. KITTRELL.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF CONTRACT.]

1. *Validity of contract governed by what law.*—In the absence of stipulations to the contrary, the validity and construction of contracts are to be determined by the law of the place where they were made; and the mere fact that a contract, invalid by the law of the place where it was entered into, may be valid in a foreign jurisdiction, is not sufficient to show that the parties contemplated its performance in that foreign jurisdiction.
2. *Validity of contract respecting emancipation of slaves.*—A contract, made in this State, and containing nothing to show that the parties contemplated its performance elsewhere, by which the purchaser of a slave binds himself to emancipate the slave whenever he shall have been reimbursed for the amount of the purchase-money by the proceeds of the slave's labor, is void. (Overruling *Prater's Adm'r v. Darby*, 24 Ala. 496.)
3. *Void contract not enforced.*—Equity will not enforce the specific performance of a contract which is contrary to public policy and void.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Pleasant W. Kittrell, against Stith Evans, to enforce the specific performance of a contract which was, in substance, as follows: On the 15th December, 1848, complainant, being then a citizen of Alabama, and about to remove to Texas, sold and delivered to the defendant, at the price of \$1250, a negro man slave, named Carney, who was a blacksmith by trade; executed to him an absolute bill of sale, and took from him, at the same time, a writing which contained the stipulations to be performed by him, and which was in these words:

"This will certify, that I have this day bought of Dr. P. W. Kittrell his negro man Carney, a blacksmith by trade, for the sum of \$1250. Now, for the protection of said boy Carney, and in order to carry out the contract formerly existing between Dr. Kittrell, his former owner, and said boy, respecting his obtaining freedom, I do hereby obligate and bind myself to the said boy, and to the said Kittrell, as soon as the said boy may, by himself or his next friend, refund to me the said sum of \$1250, with ten per cent. interest thereon until paid, then, and in that case, I will release said boy from slavery; and I further agree, that in the event of my death before the said Kittrell, then, and in that case, the said boy shall revert to the said Kittrell, on condition that he shall pay over to my legal representatives the above named sum of money, or any part that may remain unpaid at the time of my death. It is also understood and agreed, that after deducting all necessary and proper charges against said boy, I am to allow him the proceeds of his labor in the shop, to go to his credit on the above sum. December 16, 1848. STITH EVANS."

The bill alleged, that the proceeds of the slave's labor had more than repaid to the defendant the amount of the purchase-money, with the stipulated interest thereon; and that he still held and controlled the boy as a slave, and refused to allow him his freedom; and prayed a specific

performance of the contract, in order that the complainant might "remove the said boy, free from all claim and right of property forever, beyond the limits of the State of Alabama."

The defendant answered the bill; denying that the agreement sought to be enforced was any part of the contract of sale, or that it had any validity or effect whatever; and denying that the proceeds of the slave's labor had reimbursed him for the amount of the purchase-money and interest, with other proper and necessary expenses incurred by him for the slave.

The master having reported, under a reference, that the defendant had been more than repaid, from the proceeds of the slave's labor, for the amount of purchase-money and interest, and other lawful charges, the chancellor, on final hearing, rendered a decree for the complainant, and ordered the defendant, by the first day of September next after the rendition of the decree, (June 25, 1857,) "to remove or cause the slave Carney to be removed to some non-slaveholding State or country, and there emancipate and liberate him."

The chancellor's decree is now assigned as error.

I. W. GARROTT, for the appellant, contended that the agreement sought to be enforced was not shown to be a part of the original contract of sale, and was, therefore, without consideration; that it was invalid, because contrary to public policy and express statutory provisions; and that a court of equity could not compel its specific execution, because (1st) of its invalidity, because (2dly) it could not be specifically executed in the very words agreed on, and because (3dly) the court had no jurisdiction to decree its performance beyond the limits of the State of Alabama. He cited *Fitzpatrick v. Featherstone*, 3 Ala. 40; *Dial v. Hair*, 18 Ala. 798; *Mauldin, Montague & Co. v. Armistead*, 18 Ala. 500; 2 *Story's Equity*, §§ 741, 770 *a*; *Gervais v. Edwards*, 2 Dr. & War. 80; 4 *Iredell's Equity*, 555; *Jordan v. Larkins*, 4 Bro. C. C. 477; *Harriet v. Yielding*, 2 Sch. & Lef. 549; *Lyndsay v. Lynch*, 2 Sch. & Lef. 1. He further insisted, that the

case of Prater's Adm'r v. Darby, 24 Ala. 496, on which the chancellor mainly rested his decree, was inconsistent with several other decisions of this court, and could not be maintained on principle; and asked that it might be reconsidered and overruled.

W. M. BROOKS, *contra*.—The chancery court will decree the specific performance of a contract for the emancipation of a slave, when such contract is made between parties who are able to contract.—Thompson v. Williams, 1 Bibb, 422; Major v. Winn's Adm'r, 13 B. Monroe, 250; Dunlap v. Archer, 7 Dana, 30; Prater's Adm'r v. Darby, 24 Ala. 496; Atwood's case, 21 Ala. 590. There is nothing in the constitution, laws or policy of this State to forbid the execution of the contract. The appellee's agreement to emancipate the slave can be lawfully performed, either by application to the probate court, or by removing the slave to a non-slaveholding State. A party may lawfully contract for the performance by another of any act which he himself might lawfully do; and since Kittrell might lawfully have emancipated his slave, in either of the modes specified, he might well contract for the performance of the act by another.

STONE, J.—The following rules of law must be regarded as well settled:

1. That in the absence of stipulations to the contrary, contracts, as to their validity and construction, are to be determined by the law of the place where they are entered into.

2. There is a class of contracts, which, by their terms, contemplate their performance within another jurisdiction. These are governed by a different principle.—See Story's Conflict of Laws, §§ 76, 287, 288; 1 Parsons on Contracts, 228; Peake v. Yeldell, 17 Ala. 636; Jones v. Jones, 18 Ala. 248; Mays v. Williams, 27 Ala. 267; Walker v. Chapman, 22 Ala. 116.

The contract which the bill in this case seeks to have performed specifically, contains no term or stipulation which looks beyond the State of Alabama for its perform-

ance. The contract was made in the State of Alabama, and its validity must depend on the laws of this State, as they existed when the contract was entered into.

At the January term, 1838, this court held that, "under the statute of 1834, slaves cannot be emancipated in this State by will, either absolutely, or upon condition, as such attempt at emancipation would not be a compliance with the legislative direction."—*Trotter v. Blocker*, 6 Porter, 269. The same rule must exist, and the same reason for that rule, in every attempt to emancipate slaves in this State by private contract. The doctrine asserted in 1838 was steadily adhered to in this court in the cases of *Alston v. Coleman*, 7 Ala. 795; *Harrison v. Harrison*, 9 Ala. 470; *Carroll v. Brumby*, 13 Ala. 105; *Welsh v. Welsh*, 14 Ala. 76; *Pool v. Harrison*, 18 Ala. 514.

This is nothing more than another form of the rule, which declares that contracts, made in contravention of a statute, are inoperative and void.—*Dial v. Hair*, 18 Ala. 798; *Hooper v. Edwards*, 18 Ala. 280; *S. C.*, 25 Ala. 528; *Bumgardner v. Taylor*, 28 Ala. 687; *Hussey v. Roquemore*, 27 Ala. 281; *Gunter v. Lecky*, 30 Ala. 591; 1 Parsons on Contracts, 326, 381-2.

These authorities, it seems to us, demonstrate the invalidity of the agreement which the bill seeks to enforce.

Our attention has been called to the more recent case of *Prater v. Darby*, 24 Ala. 496. That case does appear to be in conflict with the principles above asserted. We feel it our duty to overrule the case last cited, so far as it conflicts with our former decisions, cited *supra*. With proper deference, we think the error of the opinion in the case of *Prater v. Darby* is shown by the decree which the chancellor was constrained to make in this case, to carry into effect the principles there declared. To avoid the imputation of illegality in the contract of Mr. Evans, presented in this record, the chancellor was forced to engraft upon that contract a term, not inserted by the parties, requiring Mr. Evans to carry the slave out of this State, to a place where he could enjoy freedom, and there to emancipate him.

Regarding the contract of Mr. Evans as void, we hold that chancery will not entertain a bill to have it specifically executed. The decree of the chancellor is reversed, and the bill dismissed, at the costs of the appellee, both in the court below, and in this court.

SAUNDERS' ADM'R vs. GARRETT.

[ATTACHMENT AND GARNISHMENT.]

1. *What demands may be subjected by garnishment.*—Where a garnishee answers, “that he is indebted to the said defendant or his wife, by promissory note in the sum of \$175, due January 1, 1856, which note was given by him to the said defendant’s wife, the trade for which it was given having been made and agreed upon by both the defendant and his wife,”—the legal presumption is, that the note was given for property belonging to the wife’s separate estate; and the plaintiff is not entitled to judgment against the garnishee on the answer.
2. *Notice to claimant of attached debt.*—Where the garnishee’s answer shows, *prima facie*, that the debt which he owes belongs to the separate estate of the defendant’s wife, and not to the defendant himself, the statute (Code, § 2549) does not authorize a notice to the wife, to contest with the attaching plaintiff her right to the debt; and if a notice is issued to her, it may be treated by her and the court as a nullity.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THE record in this case shows, that William Garrett commenced a suit by attachment, on the 21st January, 1856, against A. T. Stewart, and obtained a judgment for \$90 70, at the fall term of said circuit court, 1857; that a garnishment was served on William Saunders, as the debtor of said Stewart, on the same day the attachment was issued; and that the said garnishee, at the term to which he was summoned, filed a written answer in these words: “Garnishee says, that he is indebted to the said defendant or his wife, Sarah L. Stewart, by promissory note in the sum of \$175, due January 1, 1856,

which note was given by him to Sarah L. Stewart, wife of the said defendant; the trade for which it was given having been made and agreed upon by both the defendant and his wife." The record further shows, that at the fall term, 1856, the death of the garnishee was suggested, and a *scire facias* was awarded to bring in his administrator; that at the fall term, 1857, the suit was revived against the administrator, and a notice was ordered to issue to Mrs. Stewart, the wife of the defendant in attachment, to appear and contest with the plaintiff her right to the debt; that at the spring term, 1858, Mrs. Stewart having failed to appear, the court rendered judgment against the administrator, against his objection, on the answer of his intestate, for the amount of the plaintiff's judgment against the defendant in attachment; and that the administrator reserved an exception to this action of the court, which he here assigns as error.

R. M. WILLIAMSON, for the appellant.

GEORGE S. COX, *contra*.

RICE, C. J.—Under our statutes, the rights of married women are greater than they were under the common law. By our statutes, all the property of the wife, held by her previous to her marriage, or which she may become entitled to after the marriage, in any manner, is her separate estate, and *not subject to the payment of the debts of her husband*. Property thus belonging to her vests in her husband, as her trustee, who is not required to account with her for its rents, income or profits; but such rents, income, and profits are *not subject to the payment of the debts of her husband*. The property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them jointly, by instrument of writing, attested by two witnesses; but the proceeds of such sale is the separate estate of the wife, &c.—Code, §§ 1982, 1985.

Governed as we must be by these statutory provisions, and disregarding the common law in so far as it conflicts with them, we are unable to say from the answer of the garnishee, that the debt which the garnishee therein

admits to be due, *either* to the defendant, A. T. Stewart, or to his wife, Sarah L. Stewart, is subject to the payment of any of the debts of the husband, the said A. T. Stewart. The answer shows, that the said indebtedness of the garnishee is evidenced by a promissory note, and that the note was given by him to the said Sarah, the wife of the said A. T. Stewart; "the trade having been made and agreed upon by both defendant (A. T. Stewart) and his wife, for which the said note was given." But the answer does not in any other manner show, whether the property which was thus traded, and for which the note was given, was the property of the defendant, or the property—the separate estate—of the defendant's wife. Now, giving due effect to our statutory provisions above referred to, we think the fair intendment from what appears in the answer of the garnishee is, that the note was given for some part or all of the separate estate of the wife; else, why was it made payable to her? Why was the trade upon which it was so given made and agreed upon by both husband and wife? If the note had in fact been given for the property of the husband, the plaintiff in the garnishment should not have contented himself with accepting the answer as true, in its present scant form. As the *prima-facie* intendment from the answer is, that the note was given for the separate estate of the wife, and as the answer has been accepted and treated as true by the plaintiff, the note must be deemed the separate estate of the wife, and not subject to the debts of the husband.—See Code, §§ 1982 to 1985; Price v. Thomas, 11 Ala. 875, and Winston v. Ewing, 1 Ala. 129.

[2.] Where the answer of the garnishee shows, *prima facie*, that the debt which he owes is the separate estate of the wife of the defendant, and therefore not subject, by garnishment or any other legal process, to the payment of the debts of the defendant husband, a notice to the wife, under section 2549 of the Code, is not authorized; and, if issued, may be treated by her and the court as a nullity.

To sustain the judgment against the garnishee, on the answer set forth in this record, would be to make the

wife's separate estate subject to the payment of her husband's debts, contrary to the provisions of our statute.

It appears that the garnishee has died since he answered. The plaintiff cannot, therefore, obtain any further answer; nor can he now contest the answer.—Code, § 2546. No good can result to the plaintiff from remanding the cause *generally*.

The judgment of the court below is erroneous, and is reversed; and the cause is remanded, with directions to the circuit court to enter the proper judgment against the plaintiff, and in favor of the administrator of the garnishee. The plaintiff (who is the appellee) must pay the costs of the appeal.

HARDY vs. MEACHEM'S ADM'R.

[CONTEST RESPECTING CLAIMS AGAINST INSOLVENT ESTATE.]

1. *When objections to claims must be made.*—An objection to a claim against an insolvent estate, denying its justice, and setting up the statute of limitations, but not controverting the fact of its being filed in due time, must be made within twelve months after the declaration of insolvency, (Code, §§ 1853-4;) and the time cannot be enlarged by an agreement between the probate judge and the administrator of the estate.

APPEAL from the Probate Court of Limestone.

IN the matter of the estate of Henry Meachem, deceased, which was duly declared insolvent by the said probate court on the 12th October, 1857, and against which a claim was filed by the appellant, as a creditor, within nine months after the declaration of insolvency. No objections were filed, either by the administrator or by any of the other creditors, against the allowance of this claim, until the final settlement of the estate came on to be heard; when written objections to it were filed, "denying its justice, and interposing the plea of the statute

of limitations of three and six years." The appellant "moved the court to dismiss said objections, because they were not made or filed within twelve months after said estate had been declared insolvent. The court then stated, that it was understood between said administrator and the court, that all objections to claims against said estate might be made on the final settlement; and overruled the motion to dismiss the objections." This ruling of the court, and its final rejection of the appellant's claim, to each of which exceptions were reserved, are the matters now assigned as error.

WM. H. WALKER, for the appellant.

LUKE PRYOR, and J. B. McDONALD, *contra*.

WALKER, J.—Objections, which set up the statute of limitations, and denied the justness of a claim against an insolvent estate, and which did not controvert the filing of the claim within due time, were made more than twelve months after the declaration of insolvency. Appellant's motion to reject the objections, because they came too late, was overruled; and in overruling it, the court erred.

Sections 1853 and 1854 of the Code, when considered together, clearly prescribe, that claims against insolvent estates "*must be allowed*," if not objected to within twelve months after the declaration of insolvency. The allowance of the claim, in the absence of an objection within the prescribed time, was a right of the creditor, which could not be affected by an understanding between the judge and the administrator, that objections might be made on the final settlement.

As it is not likely that the other questions presented by the bill of exceptions will again arise, it is not necessary that we should pass upon them.

The decree of the court below, rejecting the plaintiff's claim, is reversed, and the cause remanded.

PARKER'S HEIRS *vs.* PARKER'S ADM'R.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Amendment of account-current.*—The allowance of an amendment of the account-current filed by an administrator is not a matter which will work a reversal of the decree on error, when the record does not show that the distributees were thereby surprised, or that they desired a continuance.
2. *Proof of value of services.*—When an administrator claims to retain for the value of certain services rendered to his intestate during several years before the death of the latter, in superintending the farm, making contracts for him, attending to his negroes, &c., he may prove the yearly value of such services by the opinion of witnesses.
3. *Allowance of interest to administrator.*—Where an administrator establishes a claim to the allowance of compensation for services rendered to the intestate in his life-time, extending through a series of years, the court may also allow interest on each year's wages.
4. *Implied contract between father and son.*—Whatever may be the claims of filial duty and affection, as between an aged and infirm father and his grown son, there is no principle of law, which requires the son, while living separate and apart from his father, to perform services for the latter without compensation, when the father is in comfortable circumstances; consequently, to support the son's claim to compensation for such services, proof of an express contract is not necessary.

APPEAL from the Probate Court of Tuskaloosa.

IN the matter of the estate of Owen Parker, deceased, on final settlement of the accounts of Rhese C. Parker, the administrator. The assignments of error embrace all the rulings of the court to which exceptions were reserved by the distributees, some of which require no special notice. The material facts are as follows:

“When the case was taken up, the debit side of the account was blank as to amounts. It contained two items—‘To amount of sale of personal property,’ and ‘To amount of sale of land’—but these amounts were left blank. The last item on the credit side of the account was in these words: ‘By services rendered Owen Parker, in superintending his farm, making contracts, attending to negroes, buying provisions, horses, &c., from January, 1840, to October, 1855, at \$100 per year—\$1640.’ The

amount (\$1640) appeared to have been altered from some other sum. One of the administrator's attorneys stated, that after the account had been made out and filed by his co-partner, the administrator came to him, and said, that he had forgotten to put in a charge for two horses; that he (witness) then made a memorandum on a slip of paper in these words: '1846. Dr. To one black mare, \$65; 1847. Dr. To one bay horse, \$75—\$140;' that he carried the slip of paper to the court-house, a few days after the account was filed, and made the alteration of the amount of that item in the account, and put the slip of paper in the account, intending it to show, as a part of the account, why the alteration was made. The slip of paper was found in the account. On the morning of the second day of the settlement, after all the administrator's witnesses had been examined, he asked leave of the court to amend his account, by adding the charge for the two horses mentioned in the memorandum. The contesting distributees objected, but the court allowed the amendment to be made, by attaching the slip of paper to the account with a wafer; to which the contesting distributees excepted."

The intestate died some time in the year 1855. The administrator, who was his son, claimed an allowance of \$100 *per annum* for services rendered in superintending his business, from the year 1840 up to the time of his death. The evidence adduced in relation to this matter, which is all set out in the bill of exceptions, proved the rendition of services by the administrator for his father, during the period mentioned; but there was no proof of any contract between the parties, and the witnesses differed widely in their estimate of the value of the services. The contesting distributees objected to the testimony of several of the administrator's witnesses, "so far as they severally give an opinion or estimate of the value of the alleged services of the administrator by the year," and reserved an exception to the overruling of their objection. On all the evidence adduced in relation to this item, "the court decided, that said administrator was entitled to retain for eleven years services rendered by him for the decedent in his life-time; the first seven years at \$25 per

year, the next two years at \$75 per year, and the last two years of the old man's life at \$100; and that interest should be computed on these several amounts from the end of each year respectively;" to each of which rulings of the court the contesting distributees excepted.

W. MOODY, for the appellants.

W. R. SMITH, *contra*.

STONE, J.—It is not necessary, in this case, that we should consider whether there are any cases in which we would reverse, on account of an amendment of the account-current, allowed on the trial in the probate court. Evidently, the allowance of amendments should not be permitted to prejudice the distributees; but, when the amendment operates a surprise to them, and new matter is brought up, of which they had not had notice, and which they can probably repel or explain, equal and exact justice would require, that the trial should be adjourned, if desired by them.

In the present case, it does not appear that any new matter was brought forward, of which the parties had not been notified. On the contrary, it is shown that the amendment was lodged in the office of the probate court, and, in fact, was placed in the account-current, within a few days after the account itself was filed. The case was twice continued; and we suppose, if the contesting distributees had shown to the court that they were ignorant of the claim set up in the amendment, until after they had entered upon the trial, and had further shown that they could, on another trial, produce material testimony, adverse to the allowance of such claim, the probate court would have granted them a continuance. The present record fails to show that the distributees were surprised, or that they desired a continuance.

In what we have said above, we do not wish to be understood as asserting that we would, under any circumstances, review a decision of the probate court, allowing amendments, or granting or refusing to grant a continuance.

[2.] We can perceive no valid objection to the form of the question and answer, which sought to prove the value of Rhese C. Parker's services. Those services ran through a series of years; and notwithstanding they did not employ all his time, still they were continuous in their character. We think it was permissible to prove their yearly value. A similar question was objected to in *Reese v. Gresham*, 29 Ala. 91. This court held the question free from error.

[3.] Nor do we think the court erred in the allowance of interest on the wages for each year.—See *Stoudenmeier v. Williamson*, 29 Ala. 558.

[4.] Rhese C. Parker and his father were living separate and apart from each other. The son, we have a right to suppose, had attained to majority, and hence was not under the control of his father. The father was amply solvent, and had the means of comfortable support. Whatever demands filial duty and affection might have made upon the son, we know no rule of law which requires him to perform work and labor at the request of his father, without compensation. We have carefully examined the testimony; and although the witnesses differ very materially in their estimate of the value of the services, the allowance made by the probate court is probably a very just medium between the extreme figures given by the witnesses. We do not feel authorized to disturb his conclusions.

The testimony fully authorized the allowance made for the two mares.

We have not considered the question of the exclusion of evidence. Enough of testimony that is free from objection is found in this record, to sustain the judgment of the court.

Judgment of the probate court affirmed.

HARRISON vs. DERAMUS.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT.]

1. *Waiver of right of rescission or specific performance.*—A court of equity will neither rescind nor specifically execute a contract for the sale of lands, at the suit of the purchaser, when it appears that, after discovering his vendor's want of title to a part of the tract, he accepted a conveyance of the residue, and afterwards re-conveyed a portion of them to his vendor.
2. *Compensation in equity.*—When a purchaser files a bill in equity for the rescission or specific performance of a contract, and fails to establish either branch of his case, his bill cannot be retained, in the absence of some other special equity, for the purpose of decreeing to him compensation on account of a deficiency in the quantity of land conveyed to him.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by James Harrison, against Henry G. Deramus, and alleged the following facts: That on the 29th January, 1852, complainant purchased from defendant, at the price of \$4,000, a tract of land in Autauga county, on which were a dwelling-house, a saw-mill, and some other improvements, and which was represented by defendant to contain about eleven hundred acres; that at the time this contract was made, no conveyance of the lands was executed by the defendant, but a written memorandum was signed by him, showing the terms of the sale, which was made an exhibit to the bill, and which was in these words:

“January 29th, 1852. Articles of agreement made and entered into day and date as above. Henry G. Deramus has this day sold to James Harrison his saw-mill, and all the land embraced in said mill-tract, containing about six hundred and fifty acres; also, four hundred and sixty acres on the west side of the creek, embracing the lands bought of Lamar and some entered, with the appurtenances attached to said mill—carry-log, log-wagon, &c.; also, one negro man, Boykin; all for the sum of \$4,000, to be paid as follows—\$1,000 by draft on Harrison &

Robinson; the balance in equal payments, on one and two years, with security, either E. Harrison or J. K. Whitman. H. G. DERAMUS."

The bill alleged, that the complainant, when he entered into this contract, was ignorant of the precise location and quantity of the lands, and relied on the defendant's representations in regard thereto; that his principal object in making the purchase, was to obtain the saw-mill and the timbered lands, for the purpose of carrying on the lumber business; that the defendant represented the lands lying on the west side of the creek, which were chiefly valuable on account of the timber, to contain four hundred and sixty acres, when in fact they only contained about two hundred and sixty; that he also pointed out other lands, which were heavily timbered, as belonging to his tract, when in truth he did not own them; that all these representations were fraudulently made, and the complainant was thereby deceived and induced to make the purchase; that complainant took possession of the land under the contract, paid the \$1,000 as stipulated, and gave his two notes for the balance of the purchase-money; that a short time afterwards, while complainant was on a visit to the defendant's house at night, the latter delivered to him a deed for the lands, in which they were described according to the government surveys, and which he received and carried home with him without examination; that on examining the deed the next morning, he discovered that there was a deficiency of about two hundred acres in the quantity conveyed, and immediately sent the deed back to the defendant; that defendant refused to take back the deed, but promised to make a satisfactory arrangement in regard to the deficiency of the land; that complainant was thereby induced to retain the possession of the land, and afterwards resold and conveyed to the defendant about three hundred and twenty acres of the mill-tract, including the dwelling-house and most of the cleared lands; that the defendant afterwards refused to make any arrangement whatever on account of the deficiency in the quantity of land, but brought suit on the notes for the purchase-money, and recovered judg-

ments thereon; and that the amount due on these judgments was not more than the amount which was due to the complainant on account of the deficiency in the quantity and quality of the land conveyed to him.

The bill prayed, 1st, an injunction of the judgments at law; 2d, a rescission of the contract on account of the alleged fraud, and an account "with a view to place both parties *in statu quo*;" 3d, (in the event a rescission could not be granted,) that the defendant might be compelled to account for the deficiency in the quantity of lands; and, 6th, for other and further relief consistent with equity and good conscience.

The defendant answered the bill; denying the charges of fraud and misrepresentation on his part; and alleging that the exhibit to the bill, if it was a true copy of the writing which he signed at the time the contract was made, and which was written by the complainant, was incorrectly read to him at the time, as embracing only the number of acres which he had contracted to sell to the complainant.

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

WATTS, JUDGE & JACKSON, for the appellant.—1. The bill seeks to have deducted from the unpaid purchase-money damages, or compensation, for the deficiency in the quantity of lands sold; and, in addition thereto, seeks relief on account of the fraud which is averred and proved against the defendant, in representing that the two tracts contained more lands than in fact they do, and in misrepresenting the boundaries. It is evident from the facts of the case that these misrepresentations must have been intentionally made, and they constitute an independent ground for equitable relief.—*Kennedy v. Kennedy*, 2 Ala. 572.

2. The complainant's conduct, in selling back a part of the land to the defendant, is not a waiver of the fraud. *Huckabee v. Albritton*, 10 Ala. 657.

3. The bill may well be maintained for the single pur-

pose of recovering compensation for the deficiency in the quantity of the land.—Woodcock v. Bennett, 7 Cowen, 711; Pratt v. Law, 9 Cranch, 492; Pharr v. Russell, 7 Iredell's Equity Rep. 222; Thrasher & Mitchell v. Pinckard's Heirs, 23 Ala. Rep. 616; Springle v. Shields, 17 Ala. 295.

GOLDTHWAITE & SEMPLE, *contra*.—1. If any ground of rescission originally existed, it was waived by the complainant's acceptance of the deed, with full notice of the deficiency in the quantity of lands conveyed by it, and his subsequent re-sale to the defendant of a part of the same lands; which conduct on his part is totally unexplained by the evidence.

2. The sole object of the bill, then, so far as it is sustained by the evidence, is to obtain compensation out of the unpaid purchase-money; and in this aspect it is without equity, since the remedy at law is plain and adequate, and no special equity is shown.—Sims v. McEwen, 27 Ala. 184; Hatch v. Cobb, 4 Johns. Ch. 560; Kempshall v. Stone, 5 Johns. Ch. R. 195; Todd v. Gee, 17 Vesey, 279; Greenaway v. Adams, 12 Vesey, 395; 1 Sch. & Lef. 22; Jenkins v. Parkinson, 1 Cooper's S. C. 179; Story's Equity, § 798.

RICE, C. J.—It may be admitted, that “exhibit A” to the bill shows what the contract originally was between the parties, and that if the complainant had not afterwards accepted the conveyance, bearing date February 5, 1852, and treated it as a valid conveyance, after notice of the deficiency in the quantity of the lands, he would have been entitled to redress *in a court of chancery*.—Springle v. Shields, 17 Ala. Rep. 295; Thrasher v. Pinckard, 23 Ala. R. 616; Hill v. Buckley, 17 Vesey, 393; Couse v. Boyles, *infra*.

It may be further admitted, that if the complainant had proved the allegations of his bill, as to the circumstances which induced him to accept the conveyance, and to treat it as a valid conveyance, he would, under the other allegations of his bill, and the proof in the cause, be still

entitled to redress *in a court of chancery*.—Pharr v. Russell, 7 Iredell's Eq. Rep. 222; Bailey v. Snyder, 13 Serg. & Rawle, 160; Huckabee v. Albritton, 10 Ala. 657.

But he has failed to prove the matters which he alleged, in explanation of the established fact, that he did accept the conveyance, and treat it as a valid conveyance, after notice of the deficiency in the quantity of the lands. That fact being established as one of the facts of the case, and being unexplained by evidence, the question is, whether, upon the case as now presented, the complainant is entitled to any relief in a court of chancery.

It is too clear for argument, that he is not entitled to a rescission of the contract, upon the facts as presented by the record. His right to rescind has been lost by the line of conduct he has elected to pursue, after he obtained notice of the difference in quantity between the lands as represented in the original contract, and as represented in the conveyance.—Kern v. Burnham, 28 Ala. Rep. 428; Askew v. Hooper, 28 Ala. 634.

Nor is he entitled to a specific performance of the contract originally made; because he has subsequently accepted a conveyance for all the lands mentioned in the original contract, *to which the respondent ever had any title*, and he has treated that conveyance as a valid one, after he had notice that it conveyed to him a less quantity than was mentioned in the original contract. He has, after such notice, even sold and *conveyed back to the respondent* a considerable portion of the very lands embraced in the original contract, and in the conveyance of respondent to him. A court of chancery will not do the vain thing of decreeing that the respondent shall convey to the complainant the very lands which it appears he had, before the filing of the bill, conveyed to complainant, by a deed which complainant had treated as valid, after notice that it did not embrace all the lands in the original contract: nor will the court of chancery decree that the respondent shall convey the lands not embraced in the conveyance of respondent to complainant, because, although they are embraced in the original contract, it appears that the respondent never had any title to them; and that court will never

decree that a vendor shall convey lands, to which it appears he never had any title.—Fitzpatrick v. Featherstone, 3 Ala. Rep. 40.

[2.] The case, as presented by the evidence, is then reduced to a mere case by the vendee for the recovery of damages, by way of compensation, for the deficiency in the quantity of lands; and must be treated as a suit by him, *the sole object* of which is to recover such damages or compensation, and in which it is impossible to decree to him such damages or compensation “as incidental to other relief sought by the bill and granted by the court.” No special equity appears. The vendor is a resident of the State, and not pretended to be insolvent. No discovery is sought, but, on the contrary, an answer from him under oath is expressly waived in the bill. No excuse is *proved* for the conduct of the vendee in accepting the deed, *which on its face disclosed the deficiency in quantity*, and in treating it as valid after he knew of the deficiency. No obstacle to a complete remedy at law is alleged; and the remedy at law (if one exists in any forum) is plain, adequate, and complete. The authorities compel us to hold, that in such a case, the vendee cannot recover damages or compensation in a court of chancery.—Morgan v. Patrick, 7 Ala. 185; Minge v. Smith, 4 Ala. 415; Pritchett v. Munroe, 16 Ala. 785; Gibson v. Marquis, 29 Ala. 660; Knotts v. Tarver, 8 Ala. Rep. 743; Russell v. Little, 28 Ala. 160; Sims v. McEwen, 27 Ala. 184; Couse v. Boyles, 3 Green’s Ch. R. 212; Meek v. Bearden, 5 Yerger, 467; Frederic v. Campbell, 13 Serg. & R. 136.

Decree affirmed, at the costs of appellant.

STONE, J., not sitting.

TROY *vs.* SMITH & SHIELDS.

[BILL IN EQUITY FOR FORECLOSURE OF MORTGAGE.]

1. *Subrogation*.—A creditor is entitled to the benefit of a mortgage, placed by his debtor in the hands of a surety, for indemnity or security against the debt, and may enforce it for his benefit.
2. *Conflicting liens of mortgage and execution*.—The lien of a mortgage, duly recorded, is superior to that of a purchaser at sheriff's sale against the mortgagor, under an execution issued after the registration of the mortgage.
3. *Admissibility of judgment as evidence*.—The record of a judgment is not admissible evidence, as against a prior purchaser from the defendant therein, to show the existence of an indebtedness prior to its rendition. (RICE, C. J., dissenting.)
4. *Validity of mortgage impeached for fraud*.—A mortgage, founded on valuable and adequate consideration, will not be declared void for fraud, when assailed by a subsequent purchaser at execution sale against the mortgagor, on proof of the mortgagor's embarrassed condition and relationship to the mortgagee.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the appellees, as creditors of Charles K. Walker, and sought to foreclose a mortgage on two slaves, which the said Walker had executed to his sureties on the notes due to complainants, to indemnify them against liability thereon. The notes were due on the 1st July, 1855, and the mortgage contained a power of sale in the event of any default being made in their payment. The mortgage was executed on the 20th October, 1854, and was duly proved and recorded on the 15th November following. Before the law-day of the mortgage, the slaves were sold by the sheriff under executions against said Walker, which were issued on judgments rendered in November, 1854, and were purchased at the sale by Daniel S. Troy and C. C. Pegues. After the sale under execution, the mortgage was assigned to the complainants. The purchasers at the sheriff's sale were made defendants to the bill, and filed answers, in

which they alleged fraud in the execution of the mortgage, and demurred to the bill for want of equity. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainants, which the defendants now assign as error.

GEORGE W. GAYLE, for the appellant.

BYRD & MORGAN, *contra*.

WALKER, J.—The bill in this case was filed by creditors, for the foreclosure of a mortgage on personal property, given by the principal debtor for the indemnity of one of the sureties. The complainants have a right to the benefit of the mortgage given by their principal debtor for the benefit of a surety on their debt, and may maintain a bill in chancery for the enforcement of the mortgage in their favor.—*Toulman v. Hamilton*, 7 Ala. 362; *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866. The surety in this case assigned his mortgage to the creditors, who file the bill. While this fact may not enlarge, it certainly does not diminish or detract from the complainants' rights. Their claim to relief is not dependent upon the assignment, but may be rested upon their equitable right of subrogation. The validity of the assignment of the mortgage is therefore not an important matter of examination.

[2.] The defendants Troy and Pegues purchased at a sale under execution against the mortgagor. The executions issued upon judgments rendered after the date of the mortgage, which was duly recorded within the time prescribed by law. The sale, at which Messrs. Troy and Pegues purchased, was made after the mortgage was recorded; and the executions, under which they purchased, do not appear to have issued before the mortgage was recorded. Consequently, no lien upon the slaves, in favor of the plaintiffs in the judgments, attached before the mortgage was recorded. The lien of the mortgage was, therefore, prior to that of the executions; and the right of the mortgagee, and of the complainants by subrogation, was superior to that of the execution creditors, and of

Messrs. Troy and Pegues, the purchasers under the executions, unless the mortgage is successfully assailed for fraud.—Code, §§ 2456, 1291.

[3.] To sustain the imputation of fraud, resort is had to the principle settled in *Wood v. McCain*, 4 Ala. 258; *Branch Bank v. Kinsey*, 5 Ala. 9; *McGinty v. Reeves*, 10 Ala. 127; *McCaskle v. Amarine*, 12 Ala. 17; *Dubose v. Young*, 14 Ala. R. 139; and *Pennington v. Woodall*, 17 Ala. 685. Those decisions cast the *onus* upon one claiming under a conveyance by a debtor, in a controversy with a creditor whose debt existed at the date of the conveyance, to show that there was a valuable consideration for such conveyance. That burden is not, by virtue of the principle referred to, cast upon the complainants, because it is not proved that any of the debts, to satisfy which the property was sold, existed at the date of the mortgage. A memorandum of the dates and amounts of the different judgments was, by consent, given in evidence. Those judgments are of date subsequent to the mortgage. It was also admitted, that the suits, in which the judgments were rendered, were pending at the date of the mortgage. Those judgments, and the records of the suits in which they were rendered, were *res inter alios acta* as to the complainants, and were, therefore, only evidence against them to prove the *fact* of such judgments. They were not evidence, as against strangers, that the debts existed when the suit was commenced. The records are evidence in this case, only so far as they are evidence against all the world; that is, to prove *rem ipsam*—that judgments were rendered. They cannot be evidence of the facts necessary to authorize them. A judgment of conviction of an assault and battery is evidence against every body of the fact that the defendant was so convicted, but would not be evidence, in a subsequent suit by the person beaten to recover damages, of the assault and battery, facts the ascertainment of which was necessarily involved in the conviction.—*Stephens v. Jack*, 3 Yerger, 405; 2 Starkie on Ev. 183, 184. So, here, the judgments could not be evidence of an indebtedness at the commencement of the suits, although the ascertainment

of that fact was preliminary to them.—*Snodgrass v. Bank at Decatur*, 25 Ala. 161; *Rowland v. Day*, 17 Ala. 681; *Ansley v. Carlos*, 9 Ala. 973. In the last named case, the principle is correctly stated, that a judgment is not evidence, against those who are neither parties nor privies, of the facts upon which it is founded.—See, also, *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147. As the only evidence of the debts, under which Messrs. Troy and Pegues purchased, is the records of judgments rendered after the mortgage, we decide, that there is no legal proof of the existence of those debts at the date of the mortgage, and that it is therefore not shown to be voluntary.

[4.] But reference is made to the embarrassed condition of the mortgagor, and his relationship to the mortgagee, as proof of a fraudulent intent. These facts, however, are not sufficient to establish a fraudulent intent, if the mortgage was made upon an adequate and valuable consideration. Guided by the rules of law in an examination of the evidence, we are led to the conclusion, that the indebtedness existed, to secure which the mortgage was given, and that therefore there was a valuable consideration for it. The notes secured by the mortgage were given in evidence, and they bear a date prior to that of the mortgage. There is some evidence, conducing to show the genuineness and consideration of those notes, and there is no denial of either in the answer. The notes certainly existed when the mortgage was executed. Those notes, as well as the mortgage, evidenced an admission, in solemn form, of the indebtedness which constituted the consideration of the mortgage; and we elicit from the testimony no sufficient reason for distrusting the correctness of the admission. The admission evidenced by the notes, being made before the existence of the debts under which Messrs. Troy and Pegues claim, is evidence against them. In the case of *Dubose v. Young & McDowell*, 14 Ala. 139, it was expressly ruled, that the admission of indebtedness by a grantor in a conveyance was evidence in favor of the grantee, against one who subsequently became a creditor of the grantor.—See, also,

Goodgame v. Cole, 12 Ala. 77; Simerson v. Branch Bank at Decatur, 12 Ala. 205.

Finding, upon the evidence before us, that the complainants' mortgage was neither voluntary nor fraudulent in intent, we affirm the chancellor's decree, at the costs of the appellant.

RICE, C. J., dissenting on the third point.

COUCH vs. McKELLAR.

[ACTION FOR USE AND OCCUPATION OF LAND.]

1. *Lessee's liability on implied renewal of lease.*—Where two co-administrators rent out their intestate's lands for the term of one year, and the lessee holds over after the expiration of his term; but the lands are sold, under an order of court, before the expiration of the year, and purchased by one of the administrators individually, he cannot hold the lessee liable, as on an implied renewal of the lease, when he has never been in actual possession, and did not obtain a deed until after the lessee had left the premises.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. WILLIAM M. BROOKS.

THIS action was brought by D. W. McKellar, against Wilson H. Couch, to recover \$75 for the use and occupation of a store-house during the year 1856. The only plea was *non assumpsit*. It appeared from the evidence adduced on the trial, as set out in the defendant's bill of exceptions, that the store-house belonged to the estate of one James M. Howard, deceased, of which the plaintiff and one James T. Jones were the administrators, and was rented by the plaintiff, acting for himself and his co-administrator, to the defendant, for the year 1855; that the defendant took possession under his lease, and retained the possession of the premises during the whole of the year 1855, and the month of January, 1856; that during

the year 1855 the premises were sold by the administrators, "under proper authority from the probate court, at public outcry," and were purchased by the plaintiff, who received from his co-administrator a conveyance; and that the plaintiff had not been in actual possession of the premises, nor was there any express contract between him and the defendant. On this evidence, the defendant asked the court to charge the jury,—

"1. That if he rented the premises from Jones and McKellar for the year 1855, and McKellar individually bought the land in 1855, and the defendant held over during the month of January, 1856, then he cannot be held to be in possession under the terms of the renting for 1855, and the plaintiff can claim nothing in this action from such renting.

"2. That if the plaintiff's vendors, by their contract with him, were to put him in possession, and he never was in possession, he has no right to bring this action.

"3. That if the plaintiff never got title until the 22d April, 1856, as evidenced by his deed, and was never in possession under his purchase, he cannot recover in this action."

The refusal of these charges, to which exceptions were reserved, is now assigned as error.

GEO. W. GAYLE, for the appellant.

E. W. PETTUS, ALEX. WHITE, JNO. T. MORGAN, *contra*.

STONE, J.—It is not necessary in this case to consider or decide whether, in the case of a sale, or other determination of the lessor's title during the term of the lease, the law arms the new landlord, when the lessee holds over after the termination of the lease, with the right of considering such holding over as a renewal of the lease. See *Harkins v. Pope*, 10 Ala. 493; *Chitty on Con.* 287; *Conway v. Starkweather*, 1 Denio, 113; *Farmers' and Mechanics' Bank v. Ege*, 9 Watts, 436; *Webber v. Shannon*, 3 Hill, (N. Y.) 547; *Young v. Buchanan*, 10 Gill & Johnson, 149; 2 *Platt on Leases*, 521; *Buckworth v. Simpson*, 1 *Crompton, Mees. & R.* 833; *Arden v. Sulli-*

van, 14 Ad. & Ellis, (N. S.) 832; Addison on Con. 976; 3 Kent's Com. (9th ed.) 614; Jacques v. Short, 20 Barb. (S. C.) 269; Moore v. Johns, 2 Speer's Law, 288; Roe v. Ward, 1 H. Blacks. 97; Cole v. Patterson, 25 Wend. 456; Abeel v. Radcliff, 13 Johns. 297; Crommelin v. Thiess, 31 Ala. 412.

There is a feature of this case, which must work its reversal. The record informs us that Jones and McKellar, as administrators of Howard, leased the premises to Couch for the year 1855. This recital shows, that as to these parties, the title of the store-house, and the ground on which it stood, was in the heirs of Howard. McKellar, at that time, had no title to the lot. The record informs us, also, that when McKellar instituted his suit, he had never been in actual possession. The title he offered and proved was a deed from his co-administrator to him, dated in April, 1856. Couch, the lessee, had not received the possession from McKellar, by or under any contract made with the latter in his personal capacity; and hence, the doctrine, that a tenant cannot dispute the title of the landlord under whom he holds, has no application. The only claim of Mr. McKellar rests on a contract, which, he says, the law implies from the circumstances. Never having been in actual possession, and there being no express contract for the year 1856, the law will not imply a promise from Mr. Couch to him for the use and occupation, in the absence of a title in him. The sale of the premises, without a deed made, conferred no such title as would draw to it the constructive possession.—Presnell v. Ramsour, 8 Iredell's Law, 505. See, also, Smith v. Wooding, 20 Ala. 324.

The third charge asked should have been given.

Judgment of the circuit court reversed, and cause remanded.

TUSKALOOSA BRIDGE CO. *vs.* JEMISON.

[JUDGMENT ON AWARD.]

1. *Construction of statutes respecting arbitrations.*—Statutory provisions in relation to arbitration should be liberally construed by the courts.
2. *Difference between arbitration under statute and at common law.*—Where a reference and award, though defective in some of the directory provisions of the statute, contain a substantial compliance with all its requisitions, (Code, §§ 2709–24,) they will be upheld as made under the statute.
3. *Requisites of submission.*—In a statutory reference of matters not existing in the form of a pending suit, it is not necessary that the matters in dispute should be stated with that degree of fullness and particularity which are requisite in pleading: the submission in this case is neither too concise nor too general, and sufficiently shows the character in which the parties are bound.
4. *Requisites of award.*—To sustain an award under the statute, it is sufficient that the arbitrators took the oath prescribed, gave the required notice, or had the parties personally present before them, and decided the matters submitted to them.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. WM. S. MUDD.

THIS was a motion to enter up an award of arbitrators as the judgment of the circuit court. The submission and award, on which the motion was predicated, were as follows:

“Tuskaloosa, January 13, 1858. At a meeting of the president and directors of the Tuskaloosa Bridge Company, pursuant to a call by the president, and held by appointment at the office of J. M. Van Hoose in the city of Tuskaloosa; Robert Jemison, jr., president, and Seth King, director, being present, and J. M. Van Hoose being appointed secretary, *pro tem.*,—the following resolution was adopted, to-wit:

“*Resolved*, That the unsettled matters of account existing between Robert Jemison, jr., and the Tuskaloosa Bridge Company, which the parties have not been able to settle, be referred to the arbitrament of James M. Van Hoose and Newton L. Whitfield, who, in the event they

disagree about any matter connected with the arbitrament, are authorized to call in a third person to decide between them; the company, through its secretary and treasurer, Seth King, and the said Jemison, to submit to the said arbitrators all accounts, vouchers, letters, writings, and books of entry, relating to said matters of account between the parties, and to furnish a list of the witnesses to be examined, in due time to procure the attendance of said witnesses; the said arbitrators being hereby authorized and required to take testimony in the premises by deposition or otherwise, and to enter upon the settlement here submitted to them as soon as they [have] settled the matters connected with the bridge-company at Columbus, Mississippi, referred to them by the said Jemison and King.

R. JEMISON, JR.,

President Tuskaloosa Bridge Co.

Seth King, Sec. and Treas.

R. JEMISON, JR.'

"In the matters of account between the Tuskaloosa Bridge Company and Robert Jemison, jr., referred to us by the parties by resolution of the board of directors of said company, passed at a called meeting of the directory on the — day of —, 1858, we, the arbitrators named in said resolution, having met at the office of J. M. Van Hoose, on the 27th January, 1858, pursuant to notice, and having taken the oath prescribed by statute for arbitrators in such cases, and the said parties being present, have this day entered on said matters of settlement. The said company, by Seth King, acting as its secretary, having filed the company's account against the said Jemison, and the said Jemison having filed his account against the said company, we have turned over to the respective parties said accounts for their mutual inspection, and adjourned, to meet at 3 o'clock, P. M. this day." (The award here sets out several meetings and adjournments of the arbitrators.) "February 24, 1858. Met pursuant to adjournment, the parties being present. Examined the lumber account of Jemison, and determined that it amounts to — feet, and is worth \$3,574 89. Examined also Jemison's account for labor on the bridge, and found that it amounts to \$222 95; making a total of \$3,777 84, besides

Tuskaloosa Bridge Co. v. Jemison.

interest. The above amount is allowed, subject to errors; the interest on the same to be settled hereafter." "March 3, 1858. Having investigated and decided on the accounts of Seth King, treasurer and individually, against the said company, we resumed the investigation of the accounts of said Jemison against the company, and decided to allow his account for the lumber, and interest on the same as it is stated, to-wit, \$3,777 84." "Met pursuant to adjournment. After further investigation, we decide to exclude the item of \$800, extra cost on said bridge, charged against Jemison. We have allowed the amount of said company's account against Jemison, to-wit, the sum of \$817 15, as stated. On making the account rendered, we find there is due said Jemison from said company the sum of \$3,605 15, with interest from the 1st January, 1858. It is therefore our award, that said Tuskaloosa Bridge Company pay to said R. Jemison, jr., the sum of \$3,605 15, with interest thereon from the 1st January, 1858. Given under our hands, this 4th March, 1858.

J. M. VAN HOOSE,
N. L. WHITFIELD."

The bill of exceptions states, that when the motion of Jemison, to have the award entered up as the judgment of the court, came on to be heard, "the defendant made sundry objections as to the defects and deficiency of the said motion, and of the submission and award; all of which were overruled by the court, and the defendant excepted."

The rendition of judgment on the award is the only matter assigned as error.

WILLIAM R. SMITH, for the appellant.

W. MOODY, *contra*.

RICE, C. J.—The adjustment of controversies, whether existing in the form of pending suits or not, by arbitration, has uniformly been much favored by legislation, as well as by the common law as understood in this State. Tankersley v. Richardson, 2 Stew. R. 130; Wright v. Bolton, 8 Ala. R. 548; Mobile Bay Road Co. v. Yeind,

29 Ala. 325. And it is fit that our courts should incline to a liberal construction of our statutory provisions in relation to arbitration.—Bingham's Trustee v. Guthrie, 7 Harris, 418. Such a course tends to advance the public interest, by putting an end to litigation, and discouraging multiplicity of suits; and the parties cannot complain of it, because the arbitrators are the judges of their own selection, and cannot assume jurisdiction outside of the submission, nor bind the parties beyond their consent, as evidenced in the submission.

Chapter 9, title 2, part 3 of the Code, (including the sections from number 2709 to 2724,) provides for the reference to the decision of arbitrators, to be chosen by the parties, of controversies pending in courts, and also for the reference of any controversy when no suit is pending. It declares explicitly, that "an award, made *substantially* in compliance with the provisions of this chapter, is conclusive between the parties thereto, and their privies, as to the matters submitted, and cannot be inquired into or impeached for want of form or irregularity, *if the award determines the matter or controversy submitted, and is final*; unless the arbitrators are guilty of fraud, partiality, or corruption, in making it.—Code, § 2721. And then follows a section in the following words, "Nothing in this chapter contained prevents any person or persons from settling any matters or controversy, by a reference to arbitration at common law."—Code, § 2722.

[2.] The most important question in this case, is, whether the reference and award are to be treated as a reference and award under the chapter of the Code above cited, or merely as a reference and award at common law. And in our judgment that question turns upon the answer to the inquiry, whether they are *substantially* in compliance with the provisions of the aforesaid chapter of the Code, and whether the award determines the matter or controversy submitted; for it is evident that several of the provisions of that chapter are *directory* merely, and that a compliance with them is not *essential* to give an award the character and qualities of an award made pursuant to the provisions of that chapter. Among these

directory provisions, we may mention the following—that which provides, that the parties shall state in writing that “*they desire to leave the determination*” of the matter in dispute to the persons named by them as arbitrators; and that which provides for a delivery to one or all of the arbitrators of “a list of the witnesses either party may desire to examine.”

[3.] In relation to the submission, the point of substance, under the statute, is a concise statement in writing of the matter in dispute, signed by the parties, and a reference of the same to arbitrators of their own selection. By a concise statement of the matter in dispute, is not meant such a statement as would be necessary in pleading; its main object being to direct and confine the attention of the arbitrators to the subject submitted to their investigation and decision.

It is objected to the submission in this case, as we understand it, that it is too concise. We cannot sustain that objection. One of the objects and benefits of arbitrations is, that they relieve the parties, as well as the courts, of the embarrassment which frequently arises out of pleading.—*Bingham's Trustee v. Guthrie, supra.*

Another objection is, that the submission is too general. We do not think it is. In our judgment, it is sufficient. It contains an intelligible statement of the matters referred, and thus defines with reasonable certainty the boundaries within which the arbitrators were to confine their deliberations, and beyond which they were not to pass. The general words contained in it are restrained by the context, according to a sound rule of construction; and thus the matter in dispute which is referred, is sufficiently understood by the parties, the arbitrators and court. *Scott v. Barnes*, 7 Barr, 134; *Malcolm v. Fullerton*, 2 T. R. 646; *Ross v. Watt*, 16 Illinois R. 99; *Watson on Arbitration and Awards*, 15; *Brady v. The Mayor of Brooklyn*, 1 Barbour, 584.

Another objection is, that it does not appear from the submission, and the manner in which it was signed, that Jemison in his individual capacity is bound by the submission, or that the corporation is bound by it. The

objection is untenable. The form of a written submission is a matter of indifference, if it appears from it and the acts of the parties that they intended thereby to refer the matter in dispute stated in it, to the decision of the named arbitrators, and that their decision should have the effect of an award under the statute. And a submission may be made by a corporation, by a resolution or ordinance adopted at a meeting thereof.—Brady v. The Mayor of Brooklyn, *supra* ; The Mayor v. Butler, 1 Barb. 325.

[4.] In relation to the award, the point of substance, under the statute, is, that the arbitrators should take the oath prescribed, and should either give the notice prescribed, or have the parties before them, before they proceed to hear and determine the matters referred to them; and that a majority of them should make and sign an award determining the matter or controversy submitted. Code, § 2712–2721.

Without here noticing in detail all the objections made by the appellant, we are satisfied, after a thorough examination of them, that the submission and award must be treated as a submission and award under the chapter of the Code above referred to; and that, therefore, it was right, under the facts presented in the record, to enter up the award as the judgment of the circuit court of Tuscaloosa county.—Code, § 2710.

Judgment affirmed.

SCRUGGS vs. BIBB.

[ACTION ON PROMISSORY NOTE BY PAYEE AGAINST MAKER.]

1. *Whole conversation admissible evidence, when part has been proved.*—Plaintiff having proved, that when his agent called on defendant, and mentioned to him the subject of the plaintiff's claim, defendant said, that he would start in a few days to the place of plaintiff's residence, and would there see him about it,—it is competent for the defendant to show that, in the same conversation, he said he had a receipt against the claim.

2. *Admissibility of evidence for single purpose only.*—When the court has admitted evidence which is competent for but one purpose, the opposite party, instead of moving its exclusion, should ask the court to limit its effect by appropriate instructions to the jury.
3. *Notice of award.*—When the time for the rendition of an award is enlarged at the request of one of the parties, who is personally present, in order that he may have an opportunity to produce a paper ; and the award is not rendered until after the expiration of the enlarged time,—the party is not entitled to notice of its rendition, unless it was expressly stipulated that he should have such notice.
4. *Effect of receipt as evidence.*—A receipt in full of all claims due up to its date is presumptive evidence of the payment of a demand then past maturity, and throws on the creditor the burden of proving that such demand was not in fact included in it.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. WILLIAM M. BROOKS.

THIS action was brought by John W. Seruggs, against William D. Bibb, and was commenced by attachment. The cause of action was a promissory note for \$182 36, dated January 1, 1845, and payable on the 1st July next after date, which was alleged to be lost ; and all the common money counts, with a count on an award, were added in the complaint. The defendant pleaded the general issue, with leave to give any special matter in evidence ; and the cause was submitted to a jury on issue joined thereon.

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the deposition of W. L. Patton, (with the exception hereafter referred to,) which was taken in Jackson, Mississippi, the place of the defendant's residence. This witness testified, in substance, that the note in suit, enclosed in a package with some other papers relating to the same matter, was handed to him by the plaintiff, in Huntsville, Alabama, in the summer of 1853, with the request that he would show them to the defendant on his return to Mississippi ; that he mentioned the matter to the defendant on his return home, but did not show him the papers ; that the defendant said, in reply, that he intended to start to Huntsville in a few days, and would there see the plaintiff about it ; that the papers were afterwards deposited by witness in a fire-proof safe

in a counting-house in Jackson, and could never afterwards be found. The third cross interrogatory propounded to this witness, called on him to state what the defendant said, when the claim was mentioned to him; to which the witness answered: "*Mr. Bibb said, that he had a receipt against the claim, and that he was going to Huntsville, and would there settle the matter.*" In reading the deposition in evidence, the plaintiff moved the court to exclude from the jury that portion of the above answer which is italicized, on the ground that it was illegal and irrelevant. The court overruled the motion, on the ground that it came too late; and the plaintiff excepted.

Among the papers, the loss of which was proved by the witness Patton, was an award rendered by William H. Powers and James J. McClelland, as arbitrators, under a submission by the parties to this suit of the claim now in controversy. Powers, one of the arbitrators, was introduced as a witness by the plaintiff, and testified, that the submission to them was made in the early part of the year 1853; that both the parties were present when the arbitrators first met,—the plaintiff contending that the claim was unpaid, and the defendant insisting that it had been paid; "that the defendant said, the note was embraced in a settlement which he and the plaintiff had made, which settlement and receipt he had at his house in Mississippi, and requested that the award should not be made for a specified time, (which was several months,) within which, he said, he could get the receipt, and send it to the arbitrators; that the arbitration was accordingly adjourned, without specifying any day to meet again; that they waited out the time specified, but no receipt was sent; that they then met, and made an award in writing, which was signed by both the arbitrators, and was delivered by them to the plaintiff; that the award was, in substance, that the defendant should pay the plaintiff the amount of the note with interest; and that no notice was given by them of said meeting, or of said award, except its delivery to plaintiff."

The defendant offered in evidence a receipt signed by the plaintiff, dated August 20, 1848, which was in these

words: "Received of W. D. Bibb payment in full of all claims against him which are due up to this date." This receipt, except the signature, was proved to be in the defendant's handwriting, "was written on a piece of account paper, and had the appearance of having been written at the bottom and cut off above in the original."

The court charged the jury, 1st, "that the award was void according to the evidence, and the plaintiff could not recover thereon;" 2d, "that the receipt offered by the defendant was presumptive evidence that the note had been paid." The plaintiff excepted to each of these charges, and requested the court to instruct the jury, "that they might look to all the evidence in the cause, to see if said note was embraced in the settlement on which said receipt was given." The court "did not give this charge as asked, but again instructed the jury, that the receipt was presumptive evidence of the payment of the note, and that the plaintiff could not recover on the note unless he had introduced evidence which satisfactorily rebutted that presumption;" and to these rulings of the court the plaintiff excepted.

The rulings of the court on the evidence, and in the instructions to the jury, are now assigned as error.

ROBINSON & JONES, for the appellant.

No counsel appeared for the appellee.

WALKER, J.—The plaintiff proved by his witness, Patton, that he called upon the defendant in Mississippi, and mentioned the subject of the plaintiff's claim, which he had in his possession; and that the defendant said, he intended to start to Huntsville in a few days, and would there see the plaintiff. After the introduction of that proof, it was permissible for the defendant to show, that he said, at the same time, he had a receipt against the claim, and was going to Huntsville and would settle the matter there. This last evidence was a part of the same conversation, in which the declaration proved by the plaintiff was made, and was explanatory of that declaration; and it was, therefore, admissible.—Bradford v.

Bush, 10 Ala. 386; Wilson v. Calvert, 8 Ala. 757; Rogers v. Wilson, Minor, 407.

[2.] If the evidence was inadmissible *for* the purpose of establishing a receipt, it was necessary for the plaintiff to have moved the court to limit, by appropriate instructions to the jury, the purposes for which the evidence could be legitimately considered; otherwise, the court cannot be convicted of error.—Cook & Scott v. Parham, 24 Ala. 21.

[3.] We suppose the court charged the jury, that upon the evidence the award in proof was void, because the defendant had no notice of its rendition. In that charge the court erred. The parties were both present when the arbitrators were sitting upon the case, and the time for the rendition of the award was enlarged at the defendant's request; and the award was not rendered, until after the expiration of that time. The defendant was not therefore entitled to notice of the making of the award, unless it had been stipulated or provided that he should have such notice.—2 Phillips on Evidence, 81; Mobile Bay Road v. Yeind, 29 Ala. 325; Stein v. Burden, 30 Ala. 270.

[4.] A receipt, dated after the demand sued upon became due, in full of all claims due up to its date, was certainly presumptive evidence of the payment of the demand; and the court did not err in so instructing the jury. The direction to the jury, that it was presumptive evidence of the payment of the note, did not involve the assertion that it was conclusive evidence of such payment, or deny to the evidence controverting the presumption its due weight. If the plaintiff regarded the charge as ambiguous, and tending to mislead the jury, it was his province to protect himself by asking an explanatory charge.—Part-ridge v. Forsyth, 29 Ala. 200.

The plaintiff asked the charge, that the jury might look to all the evidence in the cause, to see if the note in suit was embraced in the settlement, on which the receipt above named was given." This charge should have been given. Whether the note was embraced in the settlement, upon which the receipt was given, was a material

inquiry; and it was proper for the jury to determine that question in the light of the entire evidence.

The receipt adduced being *prima-facie* evidence of the payment of the note, the *onus* was upon the plaintiff to overcome that *prima-facie* defense; and in determining whether that *prima-facie* case was overcome by satisfactory evidence, it was the duty of the jury to scan the entire evidence. The last charge given by the court was consistent with the principle thus stated, and the court committed no error in giving it.

The judgment of the court below is reversed, and the cause remanded.

CROSSMAN vs. CROSSMAN.

[BILL IN EQUITY FOR DIVORCE ON GROUND OF ABANDONMENT.]

1. *Proof of plaintiff's residence.*—To entitle a party to a divorce, (Code, § 1969,) when the defendant is a non-resident, the plaintiff must allege and prove his own *bona-fide* residence in this State for one year next before the filing of the bill.
2. *What constitutes abandonment.*—The husband cannot obtain a divorce on the ground of abandonment, (Code, § 1961,) on proof that he removed to this State more than twenty years before the filing of his bill, and that his wife afterwards refused to comply with her promise to follow him: he must show a refusal on her part to live with him for three years next before the commencement of the suit.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Egbert Crossman, on the 20th October, 1856, for the purpose of obtaining a divorce from his wife, Mrs. Nancy Crossman, on the ground of voluntary abandonment for more than three years. It alleged, that the parties were married in Massachusetts, in January, 1827, and lived together as husband and wife until some time in 1834, when the complainant

determined to remove to Alabama; that his wife did not oppose his removal, but encouraged him to come south, and promised that she, with their two children, would follow him so soon as he had selected a home; that he settled in Wilcox county, Alabama, and resided there continuously up to the filing of the bill; that he frequently wrote to his wife, requesting her to come to his home, and remitted money to her sufficient to defray the expenses of her journey; and that she refused to comply with her promise, and would assign no reason for her refusal.

A decree *pro confesso* was duly entered against the defendant, on proof of publication against her as a non-resident. The plaintiff took the depositions of Ralph Taylor and Mrs. Harriet E. Pyncheon, the latter being a sister of the defendant. Each of these witnesses testified, that the parties had been married between twenty-five and thirty years; that the complainant, after he removed to the south, had frequently written letters to his wife and relatives, begging her to come and live with him, and had more than once sent her money to defray the expenses of her journey; and that she refused to comply with his request, but without assigning any reason for her conduct.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without prejudice; and his decree is now assigned as error.

WATTS, JUDGE & JACKSON, for the appellant.

STONE, J.—The record in this case contains no evidence that the complainant had been a *bona-fide* resident of this State for one year next before he filed his bill. Code, § 1969.

Nor does the proof show a refusal on the part of Mrs. Crossman to live with Mr. Crossman as his wife, for three years before the commencement of the suit.—Code, § 1961; *Hanberry v. Hanberry*, 29 Ala. 719.

The decree of the chancellor is affirmed.

SHERARD vs. SHERARD'S ADM'R.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Compensation for dower.*—Where the probate court decrees to the widow, as compensation for her dower interest in the lands of her deceased husband, which were sold with her consent, (Code, §§ 1873-75,) one-ninth of the purchase-money, with interest, the appellate court cannot hold the allowance inadequate, when it appears that, however healthy she may be, the widow is thirty-seven years of age.
2. *From what probate decrees appeal lies.*—"We do not assent to the proposition, that this court has no power to revise the decisions of the probate court in this class of cases;" *i. e.*, in the matter of an application by the widow, on final settlement of the estate of her deceased husband, for compensation on account of her dower interest in the lands which were sold.

APPEAL from the Probate Court of Sumter.

IN the matter of the final settlement and distribution of the estate of John H. Sherard, deceased, on the application of the widow for compensation on account of her dower interest in the lands, which had been sold, with her consent, under an order of the probate court. "The lands were sold, by order of court, on the 15th December, 1855; the widow filing her written assent thereto under the statute, and agreeing to take her portion of the proceeds of sale, which (\$37,145), with interest thereon, amounted to \$41,354 74. It was proved, in behalf of the widow, that she was, and always had been, perfectly healthy and free from disease, was thirty-seven years old, and had no separate estate; and that the decedent died in June, 1855. No other proof was introduced on the subject; and the court thereupon allowed her one-ninth of the proceeds of sale and interest; to which ruling of the court the widow excepted, on the ground that the allowance was too small," and which she now assigns as error.

W. R. WETMORE, for the appellant.

TURNER REAVIS, *contra*.

RICE, C. J.—We understand it to be conceded by the parties, that the dower interest of the widow in the land of her deceased husband, by her consent, and under section 1873 of the Code, was sold with the residue of the land, by order of the judge of probate; that the sale was confirmed; that the purchase-money was collected by the administrator of the deceased husband; and that afterwards, and before the final settlement of the estate had been made, the widow applied to the judge of probate, to make an order that a fair equivalent for her dower interest be paid to her by the administrator.

In such a case, it was the duty of the judge of probate, under section 1874 of the Code, to make such order; but in making the order, he was bound to pay due respect to the rule declared in that section, that “the value of the dower interest (is) to be ascertained by proof, having regard to the age and health of the dowress;” and to the rule declared in section 1875 of the Code, that “the provisions of the preceding section must not be so construed as to allow the widow, *in any case*, more than one-sixth of the purchase-money.”

In determining one-ninth of the purchase-money and interest to be a fair equivalent for the dower interest of the widow in the present case, upon the proof set forth in the record, it does not appear that the judge of probate proceeded upon any wrong principle, or violated any rule of law; nor does it appear that the allowance is inadequate. Section 1875 of the Code establishes one-sixth of the purchase-money, as the *maximum* that can be allowed “*in any case* ;” and as more than that could not be allowed to a widow of extreme youth and perfect health, we know of no rule of law which would require a court to decide, that one-ninth of the purchase-money, with interest, was too small an allowance for the dower interest of a widow thirty-seven years old, however healthy she might be.—See Wright v. Jennings, 1 Bailey, 277; McCreary v. Cloud, 2 Bailey, 343; Beavers v. Smith, 11 Ala. 20; Springle v. Shields, 17 Ala. 295.

We deem it proper to say, that we do not assent to the proposition, that this court has no power to revise the de-

cisions of the judge of probate in this class of cases.—See Wright v. Jennings, and McCreary v. Cloud, *supra*; Pulliam v. Owen, 25 Ala. 492; Shepard v. Parker, 13 Hedell, 103. But in the present case, no error is shown to have been committed, and therefore we affirm the decree of the court below.

ELLIOTT vs. COOK.

[APPLICATION FOR REHEARING AFTER FINAL JUDGMENT AT LAW.]

1. *Facts insufficient to authorize rehearing.*—After final judgment on verdict, the defendant cannot obtain a rehearing, (Code, § 2408,) by showing that his witnesses were absent at the trial term; that he was ruled to a strict showing for a continuance, contrary to the usual practice of the court, and was unable to state fully the facts which his witnesses would prove; and that the jury, being anxious to return to their homes on Saturday evening, decided the case without due deliberation.

APPEAL from the Circuit Court of Lauderdale.

(The name of the presiding judge is not shown by the record.)

THIS was an application for a rehearing after final judgment at law, under section 2408 of the Code. The application was made by Robert Elliott, against whom a judgment had been rendered in favor of Lemuel Cook, at the April term, 1857, of said circuit court, and alleged these facts: That the action was instituted at the April term, 1857, and sought to recover for pretended services rendered by the plaintiff therein, as counsel for the defendant in two chancery cases; that the petitioner “made every effort to be ready for the trial of the cause,” by having certain named persons summoned to attend as witnesses; “that none of said witnesses were in attendance,—some being detained by sickness, and others from business engagements and other causes which petitioner

could not control;" that he was advised by his counsel "that the practice of the court, in litigated cases, was to grant continuances at the first term, where the parties were not fully ready, upon their affidavit that they had a good and substantial defense to the merits of the suit;" that the court, "from some cause, departed from this usual practice, and required him to make a strict showing, which he could not do as fully as the witnesses themselves would make, not having had time to see and converse with all of them, so as to know fully what they would prove;" "that he was thus forced to a trial wholly unprepared, late on Saturday evening, when the jurors were tired, and restless, and anxious to go to their homes, many of them residing some distance in the country;" "that his case was thus summarily disposed of, without that fair and impartial trial which courts of law are bound to render to every citizen;" and that he had a valid defense against the plaintiff's claim, which he could establish at the next term of the court.

The court sustained a demurrer to the petition, and its ruling is now assigned as error.

ELMORE & YANCEY, for the appellant.

J. W. SHEPHERD, *contra*.

WALKER, J.—The appellant does not show, by his petition, that he was "prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part." The demurrer to the petition was, therefore, properly sustained; and the judgment of the court below must be affirmed.—*White v. Ryan & Martin*, 31 Ala. 400; *Stewart v. Williams*, at the present term.

STEWART *vs.* WILLIAMS.

[APPLICATION FOR REHEARING AFTER FINAL JUDGMENT AT LAW.]

1. *Facts not sufficient to authorize rehearing.*—After judgment on verdict against the plaintiff, in an action brought by him to recover the price of a negro sold to defendant, he cannot obtain a rehearing under the statute, (Code, § 2408,) by showing that his bill of sale for the slave, which was read in evidence on the trial by the defendant, by mistake contained a warranty both of soundness and title, instead of a warranty of title only; that he was not apprised of the mistake until after the trial, and was not personally present at the trial, which was had at a place seventy miles distant from his residence; that the case had been previously referred to arbitrators, but the submission was rescinded on account of the defendant's failure to comply with its stipulations; and that the case was afterwards tried before the plaintiff had any knowledge of its condition.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. ROBERT DOUGHERTY.

THIS was an application for a rehearing after final judgment at law, under section 2408, by Ezekiel Stewart, who was the plaintiff in the action at law. The action was commenced in April, 1846, and was founded on the defendant's promissory note for \$35, and his breach of a written agreement to deliver to plaintiff a horse, wagon, and yoke of oxen. The note and property mentioned were the agreed price of a negro and a mare, sold and delivered by plaintiff to defendant, on a contract of exchange or sale. The cause was tried at the spring term of the court, 1855, and resulted in a verdict and judgment for the defendant, for \$173 53, besides costs.

The facts alleged in the petition for a rehearing were these: That the bill of sale for the slave, which was read in evidence on the trial by the defendant, contained a warranty both of title and soundness; that said bill of sale, if ever executed at all by the petitioner, "was executed under a mistake on his part as to its legal effect, as it was expressly understood between him and the defendant, at the time of the sale, that only the title to the slave

was warranted;" that he had always believed that it contained only a warranty of title, and had informed his attorney that such was the fact; that the bill of sale, as read in evidence, operated a surprise on his attorney, as well as a fraud on his rights; that he was not present at the trial, having removed from the county several years before that time, and then residing about seventy-five miles from the court-house where the trial was had; that he was not apprised of the mistake in the bill of sale until after the trial; that the cause had been once referred to arbitration, at the instance of the defendant, but the agreement of submission was rescinded, on account of the defendant's failure to comply with its stipulations, and the cause was reinstated on the trial docket; and that "the suit was afterwards tried before petitioner had any knowledge of its condition."

The court sustained a demurrer to the petition, and its judgment is now assigned as error.

JNO. T. HEFLIN, for the appellant.

STONE, J.—The remedy provided by the Code, (sections 2408, *et seq.*) is purely statutory. To claim the benefit of its remedial provisions, the applicant must set forth in his petition facts which show that, *without fault on his part*, he "has been prevented from making his defense by surprise, accident, mistake or fraud;" and this application must be made within four months after the rendition of judgment.

In Pratt v. Keils, 28 Ala. 390, and in White v. Ryan & Martin, 31 Ala. 400, we construed the sections of the Code which confer the remedy invoked in this case. In the case last cited, the reasons offered in support of the application for a rehearing were much stronger than those found in this record. Yet we said in that case, "If all the facts stated in it are true, they would not authorize any court, having any regard for well established legal principles and a sound public policy, to say that the defendant was prevented from making his defense in the original cause, *without fault on his part.*" That case is

decisive of this. The petition being fatally defective, it did not present a case of which the court could take jurisdiction, in this summary way; and the circuit court did right in repudiating the cause. The demurrer is not found in the record; and, if necessary, we would intend it was formally put in.

Judgment of the circuit court affirmed.

STEWART vs. STOKES.

[BILL IN EQUITY BY PURCHASER TO OBTAIN TITLE TO LAND.]

1. *Sheriff's power and duty in executing conveyance to purchaser.*—The power of a sheriff to sell land under execution, to receive the purchase-money, and to execute a conveyance to the purchaser, is not a mere naked power, but a power coupled with a trust, which it is his duty to execute; and this trust does not become extinct by his death before the execution of a conveyance to the purchaser, after he has received the purchase-money and made due return of the execution.
2. *Equitable relief against accident.*—The death of a sheriff, after he had received the purchase-money of land sold at execution sale, and had made due return of the execution, but before he had executed a deed to the purchaser, is an accident against which a court of equity will relieve, at the instance of the purchaser or a sub-purchaser, by decreeing a divestiture of the title out of the defendant in execution.
3. *Laches explained.*—In such case, relief will not be refused on account of the laches of the purchaser or sub-purchaser, when it appears that the defendant in execution knew and acquiesced in the claim and exercise of ownership by the purchaser, until after the latter, having sold the land to another, had removed with all his property beyond the limits of the State.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Charles Stewart, for the purpose of obtaining from the defendant, John Stokes, a divestiture of the legal title to a tract of land, which the complainant had purchased from one Willis B. Stokes, who had previously purchased it at sheriff's sale under execution against said John Stokes, his father; and to

enjoin the said John Stokes from cutting and hauling away timber from the land. The land was held by said John Stokes under patent from the United States, and was sold under execution against him by the sheriff of Greene county, on the 16th May, 1842. The bill alleged, that Willis B. Stokes, who became the purchaser at the sheriff's sale, was at that time residing with his father on the land; that he paid the entire purchase-money to the sheriff, entered upon and claimed the land, by virtue of his purchase, with the knowledge and acquiescence of his father, the said defendant in execution, and continued to cut timber and exercise other acts of ownership until January, 1854, when he sold and conveyed the land to the complainant, and afterwards removed with all his property beyond the limits of the State; that the complainant paid the entire purchase-money due under his contract, received a conveyance from his vendor, took possession of the land under his purchase, and continued to exercise acts of ownership up to the filing of the bill; that the sheriff, on receiving payment of the purchase-money from said Willis B. Stokes, made due return of the execution, and promised to execute a deed for the land to said Willis; and that he died in October, 1848, without having ever complied with his said promise.

The chancellor sustained a demurrer to the bill, for want of equity; and his decree is now assigned as error.

WEBB & INGE, for the appellant.

S. F. HALE, *contra*.

RICE, C. J.—The power of the sheriff, in this State, under *fiery facias*, to sell land, receive the purchase-money, endorse the sale and receipt of the purchase-money on the *fiery facias*, and execute a conveyance to the purchaser, is not a mere naked power, but a power coupled with a trust. It is a power which it is the duty of the sheriff to execute; made his duty *by law*, which has given him an interest extensive enough to enable him to discharge it. It is not given to him as a mere power, but as a trust and duty which he ought to fulfill; “and his

omission to do so, by accident or design, ought not to disappoint" the object for which the power in the nature of a trust was conferred by the law. This case is in its nature similar to that class of cases, "where trusts, or powers in the nature of trusts, are required to be executed by the trustee in favor of particular persons, and they fail of being so executed by casualty or accident. In all such cases, (as stated by Judge Story,) equity will interpose, and grant equitable relief."—1 Story's Eq. Jur. § 98; Gibbs v. Marsh, 2 Metc. 243; Withers v. Yeadon, 1 Rich. Eq. R. 325; Osgood v. Franklin, 2 Johns. Ch. R. 1.

Where the sheriff has made the sale, received the purchase-money at the time, and duly returned the *feri facias* with the sale and receipt of the purchase-money properly endorsed thereon, the trust does not become extinct by the death of the sheriff before he executed a conveyance to the purchaser. The purchaser being in such case entitled to a conveyance from the sheriff, at the time the sheriff died, his death is a casualty or accident against which a court of equity can relieve.

The general rule is fully admitted, that courts of equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault. But that general rule cannot control the present case; 1st, because the duty of the sheriff to execute the conveyance, was not "created by the party," by any positive contract or obligation, but was "created by law," (1 Story's Eq. Jur. § 101;) 2d, because the delay in the execution of the deed until the sheriff's death, was accompanied by acts of ownership over the land and claim of ownership by the purchaser at sheriff's sale under his purchase, and the aforesaid delay and acts and claim of ownership were known to and acquiesced in by the defendant in the *feri facias*, (Waters v. Travis, 9 Johns. Rep. 450;) and 3d, because the defendant in the *feri facias* remained silent after the sheriff's sale, until long after his son (who was the purchaser at that sale) had, after acts of ownership, sold the land to the complainant, and put him in the control of it, and had removed from the State with all his property. It seems to us that the bill

shows, that the complainant has a clear right to have the title to the land divested out of the defendant in the *feri facias* (the respondent in this case), and invested in himself; that this right cannot be enforced in a suitable manner, otherwise than by a suit like this; that the complainant has a superior equity to the party from whom he seeks relief, and that he will be subjected to an unjustifiable loss, without any blame or misconduct on his part, unless relief is granted in this case.—1 Story's Equity, § 109.

The decree of the chancellor is erroneous, and is reversed; and the cause is remanded. The appellee must pay the costs of the appeal.

DANFORTH vs. HERBERT.

[BILL IN EQUITY TO ESTABLISH RESULTING TRUST IN SLAVES.]

1. *When resulting trust will be established in equity.*—Where the surviving brothers and sisters of a decedent agree, that the money arising from the sale of his lands may be appropriated to the use and support of their father and mother, during the rest of their lives; and one of them, having the money in his possession, invests it in the purchase of a slave, taking the title in his own name, a resulting trust arises, at the election of the other brothers and sisters, in their favor; but, when they file a bill to establish and enforce such trust, they must allege that the slave was purchased and paid for with the trust funds.
2. *Dismissal of bill without prejudice.*—When a bill is defective for want of necessary allegations, but the evidence shows that the plaintiffs have a good cause of action, the bill should not be dismissed absolutely; and if the chancellor, on final hearing on pleadings and proof, dismisses the bill absolutely, the appellate court will so far reverse his decree as to order the dismissal to be without prejudice.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. JOHN FOSTER.

The material facts are stated at sufficient length in the opinion of the court.

WALKER, CABANISS & BRICKELL, for appellant.

ROBINSON & JONES, *contra*.

WALKER, J.—The purpose of the bill in this case was, to establish a trust in favor of the complainants and the defendants, in a certain negro woman Sylvia, and her increase, the legal title to which was in one of the defendants, as the administrator of John G. Finch, deceased. The case made by the bill is, that the brothers and sisters of James L. Finch deceased, as his heirs, were entitled to a tract of land; that by agreement it was sold, with a view to appropriate the money arising from the sale, with the interest thereon, to the benefit of their father and mother; that Henry Finch, who had the money in his charge, died; that the remainder, not appropriated, after his death was delivered by his administratrix to John G. Finch, who bought the negro woman, Sylvia, and took the title to himself. If the bill had averred, that John G. Finch purchased the slave with the money received from the administratrix of Henry Finch, deceased, which belonged to the brothers and sisters of James L. Finch, deceased, or to those who had succeeded to their rights, then John G. Finch would have been, at their election, a trustee for them. But unfortunately the bill does not contain such an averment. It does not even allege, that the money received by John G. Finch from the administratrix of Henry Finch was equal in amount to the purchase-money of the slave. All disclosed by the bill may be true, and yet it may be that John G. Finch purchased the slave with his own money, and at a price greatly exceeding the money received from the representative of Henry Finch. The bill fails, therefore, to make out a trust upon the ground of the ownership of the purchase-money of the slave.

It is alleged in the bill, also, that the purchase was made by verbal agreement of all the parties interested in the money. It does not appear, that the agreement was for the purchase to be made with the funds above named, or that it should be made for those parties. This allegation, therefore, is not one upon which we can predicate

the inference of a trust. It is true that we can make out, by inference and argument from the bill, that John G. Finch purchased for and with the money of the persons for whom a trust is claimed. But that is not enough. We can only sustain the equity of the bill upon facts alleged; we cannot sustain it upon facts inferred. The bill fails to show a trust in favor of the parties alleged; and, therefore, being without equity, it was properly dismissed.

[2.] It would have comported with our wishes and sense of justice to have decided this case upon the merits, as disclosed in the evidence; and we had prepared to do so, before we detected the deficiency in the bill. Our examination of the evidence convinces us, however, that the chancellor ought to have dismissed the bill without prejudice. His decree must, therefore, be reversed, and a decree must be here rendered, dismissing the complainants' bill without prejudice to their right of instituting another suit; and the appellants must pay the costs of the court below, and of this court.

KING vs. JEMISON.

[JUDGMENT ON AWARD.]

1. *Requisites and sufficiency of submission.*—A written agreement, “between R. J., acting individually, and S. K., and between the Columbus Bridge Company, represented by R. J. as its president, and S. K.,” signed by both parties, and submitting to the determination of certain named arbitrators “the difficulties existing between the above mentioned parties in relation to the said Columbus bridge,” is a substantial compliance with the requisitions of the statute (Code, §§ 2709–21) relative to submissions to arbitration.
2. *Requisites and sufficiency of award.*—Under a written submission to arbitration, “between R. J., acting individually, and S. K., and between the Columbus Bridge Company, represented by R. J. as its president, and S. K.,” of “the difficulties existing between the above mentioned parties in relation to the said Columbus bridge,”—an award, duly signed by the arbitrators; determining “that the said J. and K. are equal owners of all the stock in

said bridge-company ;" settling "the profit and loss of said stock upon the basis of their equal interest and ownership ;" and finally, after reciting that the arbitrators, "after a careful investigation of the accounts, papers and evidence submitted, have made up an accurate account between the said S. K. and R. J., in the matter of their joint interest in the stock of the said bridge-company," deciding that said K. is indebted to J. in a specified amount, and directing payment to be made,—shows a determination of the matters submitted, and is sufficient.

3. *Admissibility of parol evidence to affect award.*—On motion to have an award entered up as the judgment of the circuit court, the oral testimony of one of the arbitrators, contradicting one of the facts recited in the award as having been ascertained by the arbitrators, is inadmissible ; the award not being assailed for fraud, partiality, or corruption.
4. *Execution on award.*—If an award, made in substantial compliance with the requisitions of the statute, is not performed within ten days after notice of its rendition and delivery of a copy thereof, the papers may be filed in the office of the circuit court, and an execution immediately issued on the award.

APPEAL from the Circuit Court of Tuskalooza.

Tried before the Hon. WILLIAM S. MUDD.

THE record in this case shows the following facts :

On the 5th March, 1858, a submission and award were returned into the office of the clerk of said circuit court, which were as follows :

"Articles of agreement, between Robert Jemison, jr., acting individually, and Seth King ; and between the Columbus (Miss.) Bridge Company, represented by R. Jemison, jr., as its president, and Seth King. For the purpose of settling amicably the difficulties existing between the above mentioned parties, in relation to the said Columbus bridge, they hereby agree to submit the matters in controversy to the decision of two arbitrators, one selected by each party ; and in case the arbitrators so selected fail to agree, they shall select an umpire. In conducting the arbitration, the following rules shall be observed by the arbitrators and the parties above mentioned : 1st, All books, papers and receipts of the bridge-company shall be submitted to the inspection of the aforesaid parties and arbitrators. 2d, Said parties can make their statements verbally or in writing, or both, and shall be allowed a reasonable time to produce their proofs to substantiate their statements. 3d, All letters, books

and papers, relative to the matters in controversy, shall be received in evidence, as well as personal testimony, to be given verbally, or taken by deposition; in the latter case, notice shall be given to the adverse party. 4th, Each party pledges himself to produce all vouchers, letters, books, or other evidence in his possession, calculated to explain any transaction in connection with the matters referred. 5th, The arbitrators shall decide said controversy upon principles of equity and justice, and write out their decision. 6th, The parties agree to abide such decision, and, in testimony thereof, hereunto set their hands, on this, the 25th February, A. D. 1857.

R. JEMISON, JR.,
for himself, and as president Columbus Bridge Co.

SETH KING."

(The arbitrators named at the bottom of the submission, were N. L. Whitfield and J. M. Van Hoose.)

"In the matters of account between Seth King and Robert Jemison, jr., connected with the bridge-company at Columbus, Mississippi, and referred to us (James M. Van Hoose and N. L. Whitfield) for arbitration and settlement, we, the said Van Hoose and Whitfield, having met at the office of said Van Hoose in the city of Tuska-loosa, this 21st January, 1858, have each taken the oath required of arbitrators by the statute in such cases; and the said King and Jemison being present, we have this day entered upon the settlement, at the place aforesaid. First, we are satisfied from the evidence submitted, that the said King and Jemison are equal owners of all the stock in said bridge-company; and we will proceed to settle the profit and loss of said stock, upon the basis of their equal interest and ownership of said stock. We have spent this day in examining accounts presented by Messrs. King and Jemison, and other papers. We have also examined C. Templeton and Green Hill as witnesses in the case. We have settled no items in the accounts presented, and adjourn further examination until 9 o'clock to-morrow morning at the same place.

"January 22, 1858. Met pursuant to adjournment,

Messrs. King and Jemison being present. After as thorough examination as we can make of the matter, we have this day allowed Jemison's account; including the lumber furnished by him and the moneys advanced by him in the original construction of the bridge, amounting as rendered to the sum of \$12,438 43, subject to correction of all errors that may be made to appear before our final decision. The account is for the years 1842, 1843, and 1844, and subject to like correction of errors. We have allowed, also, Jemison's account for lumber and materials furnished, and cash advanced, in the construction of a draw to said bridge in the years 1850, 1851, and 1852; amount as rendered being \$9,297 61. Adjourned, to meet to-morrow at 2 o'clock, P. M.

"January 23, 1858. Met pursuant to adjournment, Messrs. King and Jemison being present. We have examined the account for building the draw to the bridge, and leave it passed upon as stated in our memorandum of yesterday's sitting; and there being no new matter presented, we adjourn, to meet on Monday, the 25th instant, at same place, at 10 o'clock, A. M.

"January 25, 1858. Met pursuant to adjournment, Messrs. King and Jemison being present. Examined Green Hlll, witness to support account of receipts of bridge by Jemison as rendered, and have taken said account of receipts under consideration. We have allowed King the sum of \$2,573 23, on his account submitted of moneys advanced in the original construction of the bridge. In amount above allowed King, is included 15 per cent. premium on \$212 specie advanced by him. Have also allowed Jemison 15 per cent. on \$560 specie advanced by him. We find that the amount of \$272 29, charged in King's account as paid to B. Williamson, does not enter into the bridge account, but is a charge against Jemison individually. Adjourned, to meet at same place, at 10 o'clock to-morrow morning.

"January 26, 1858. Met pursuant to adjournment, Messrs. King and Jemison being present. We have allowed the accounts of annual receipts of tolls from the bridge, including annual expenditures for the bridge,

from the year 1844 to 1857, both inclusive, (say, fourteen years,) as rendered by Jemison, subject to correction of errors before making our final award. We find that the item of \$256 26, in account rendered by King as amount due from Jemison for bridge dividends, has been paid by Jemison, and is therefore stricken from the account. We find, also, that the item of \$145 75 in same account, paid on King's order on S. P. Storrs of Wetumpka, should [be] \$9 less, to-wit, \$136 75. And we now proceed to make up the final account, upon the basis of allowances as hereinbefore stated. We have determined that interest shall be computed in this settlement according to the law of Alabama. After a careful investigation of the accounts, papers and evidence submitted to us, we have made up an accurate account between the said King and Jemison, in the matter of their joint interest in the stock of the Columbus Bridge Company, at Columbus, Mississippi, and find the said King indebted in this behalf to the said Jemison, on the 1st January, 1858, in the sum of \$7,660 95. It is therefore our award in this behalf, that the said King pay to the said R. Jemison the said sum of \$7,660 95, with interest on said sum from the 1st January, 1858. Given under our hands, this 28th January, 1858.

N. L. WHITFIELD,
J. M. VAN HOOSE."

Appended to the award, as filed in court, was a certificate of the arbitrators, stating that they had delivered a copy of the award to Jemison on the 29th January, 1858, and another copy to King on the 2d February.

On the filing of the submission and award in court, an execution was thereon issued by the clerk, on the same day, for the amount awarded against King, with costs. At the ensuing term of the circuit court, held in March, 1858, King moved the court, pursuant to notice previously given, to set aside the award, and to quash the execution; and at the same term Jemison moved the court to enter up the award *nunc pro tunc*, as of the day on which the papers were filed with the clerk, as the judgment of the court. The motions were heard together, and each party reserved exceptions to the rulings of the court.

“The defendant (King) moved the court to examine the said arbitrators as witnesses, as to whether or not there were any matters submitted which were not decided, or, if decided, whether the said matters were mentioned in the award, or whether there was any admission by Jemison that any other person than himself and King owned or claimed any of the said stock. The said arbitrators stated, in substance, that Jemison stated to them, that he had made a contract with Wynn and Abbott, two gentlemen of Columbus, Mississippi, for the purchase of a ferry, for which he was to give them twenty-five shares of the stock of the said bridge; that it did not, however, appear in evidence to the arbitrators that there had been any deed to the ferry, or any transfer of stock to said Wynn and Abbott, although the ferry came into the possession of the company; that the arbitrators thereupon concluded that this matter of the ferry did not interfere with their decision, previously made, that said Jemison and King were joint owners of the said stock, and the matter of the ferry was passed by without further notice by them; and that this was before the making up of their final award. The court ruled, that this statement of the arbitrators could not enter into the considerations of the court in deciding upon the motion, and therefore ruled out the evidence; to which ruling of the court the defendant (King) excepted.”

“The defendant also made sundry objections to the plaintiff’s motion to enter up the award as the judgment of the court; all of which the court overruled, and directed the award to be entered up as the judgment of the court; to which the defendant excepted.”

The court sustained the defendant’s motion to quash the execution, “on the ground that the clerk could not issue an execution on the award until the court had ordered it to be entered up as the judgment of the court;” to which ruling of the court an exception was reserved by Jemison.

By consent, each party assigns as error in this court the rulings of the primary court to which he excepted.

WM. R. SMITH, for the appellant, made these points :

1. The submission is too general and indefinite in the statement of the matters submitted to arbitration. It cannot be sustained under the statute, as "a concise statement of the matters in dispute.—Hickey v. Grooms, 4 J. J. Mar. 125.

2. The award cannot be upheld, because it does not show a determination of all the matters embraced in the submission. The submission specifies two classes of difficulties—1st, those existing between King and Jemison individually; and, 2dly, those existing between King and the Columbus Bridge Company; and it was necessary to the validity of the award that all these difficulties should be passed upon and settled. The award does not follow the submission, either as to parties, or as to subject-matter.—1 H. & J. 671; 11 Gill & J. 299; 2 Hayw. 30; 7 H. & J. 70; 1 Dana, 351; 8 N. H. 82; 13 Johns. 27; 6 Pick. 269; 3 Barbour, 56; 4 Barbour, 253; 12 Wendell, 377; 14 Johns. 96; 1 Peters, 174; 2 Moore, 728, or 4 E. C. L. 421; Davis v. McConnell, 4 Stew. 492; 15 Ala. 398.

3. The favor extended by the courts to arbitrations, applies only to arbitrations at common law, and to such statutory provisions on the subject as are not stringent, penal, or summary. But statutes which trench upon judicial power, which create a new jurisdiction, which innovate upon the common law, or which confer summary remedies, are to be strictly construed.—19 Ala. 43; 20 Ala. 189, 544; 30 Ala. 519.

4. The entire statute is unconstitutional. It creates a judicial tribunal, not "elected, qualified, and commissioned" as judges are required to be by the constitution, and whose jurisdiction is unlimited as to amount; excludes the right of trial by jury, and, by using the word *final*, drives the party into chancery to show fraud, partiality or corruption in the arbitrators.

5. The court committed no error in quashing the execution. The statute does not authorize the clerk to issue an execution on the award, until it has been entered up, on motion to the court, as the judgment of the court.

W. MOODY, and GEO. GOLDTHWAITE, *contra*.—1. Arbitrations were greatly favored by the courts at common law, and statutory provisions on the subject have always been liberally construed. All reasonable intendments are made in support of them, and that mode of settling controversies is encouraged. It is a cheap and expeditious mode of deciding controversies, by judges selected by the parties themselves, and acting under the sanction of an oath.—Price v. Kirby, 1 Ala. 186; Tanksersly v. Richardson, 2 Stew. 132; Reynolds v. Reynolds, 15 Ala. 403; Byrd v. Odem, 9 Ala. 766; Mobile Bay Road Co. v. Yiend, 29 Ala. 326.

2. The submission was clearly under the statute. No single provision of the statute was disregarded or neglected in it, or in the proceedings had under it. Its sufficiency is supported by the following cases: Callahan v. McAlexander, 1 Ala. 367; Byrd v. Odem, 9 Ala. 766; Lamar v. Nicholson, 7 Porter, 165; Malcolm v. Fullerton, 2 Term Reports, 645; Merritt v. Merritt, 11 Illinois, 565.

3. If the facts recited and ascertained in and by the award be true, (as they must be considered in the absence of proof of fraud, partiality or corruption on the part of the arbitrators,) the award shows a full determination of all the matters embraced in the submission.—Smith v. Johnson, 15 East, 213; Cro. Eliz. 838; Karthaus v. Ferrer, 1 Peters, 222; Jackson v. Ambler, 14 Johns. 96; 8 Co. 98; Kyd on Awards, 72; Byrd v. Odem, 9 Ala. 766; Goodwin v. Yarborough, 1 Stew. 153.

4. The award was final, and could not be impeached by proof of errors and mistakes, if any such existed.—Code, § 2721; Bumpass v. Webb, 4 Porter, 70; Goodwin v. Yarborough, 1 Stew. 153.

5. If the award is not performed within ten days after notice and delivery of copy, and is thereupon returned into court, the statute expressly declares, that it "has the force and effect of a judgment at law, on which execution may issue as in other cases."—Code, § 2714. No action of the court is contemplated to make the award operate as a judgment. It is the duty of the clerk to issue

execution on it immediately, as in case of a forfeited delivery bond.

STONE, J.—In the case of the president and directors of the Tuskaloosa Bridge Company v. Jemison, during the present term, we announced principles which must be regarded as decisive of the principal question in this cause. The submissions in that case and in this are substantially alike; and inasmuch as each submission is in writing, signed by the parties, contains a concise statement of the matter in dispute, and refers the determination thereof to certain named arbitrators, we hold that the submission was under the Code, and must be determined by its provisions.—§§ 2710–2721, inclusive.

The principles asserted in *Hickey v. Grooms*, 4 J. J. Marshall, 124, are not opposed to this view. In that case, the parties referred a *special matter* designated in the submission, and *all other matters in contest between them*, to arbitration. The court of appeals of Kentucky, under a statute similar to ours, as we gather from the opinion pronounced, ruled, that the “other matters in contest” between the parties were not sufficiently identified to be brought within the statute. We agree with that court, that the language there employed was not a “concise statement in writing of their controversy.” As to the “other matters in contest,” it was no statement at all; gave no information of what those *other matters* were. In the present record, the matters submitted are certain *difficulties in relation to the said Columbus bridge*. This, we hold, is a statement in writing of *the matter in dispute*, and sufficiently identifies it.

[2.] It is objected, that the arbitrators did not determine the matter or controversy submitted, because they did not, in terms, pronounce on the difficulties existing between the Columbus Bridge Company and King. The record does not sustain the appellant in this position. The award finds, and asserts as a fact, “that the said King and Jemison are equal owners of all the stock in said bridge-company.” It then proceeds to “settle the profit and loss of said stock upon the basis of their equal inter-

est and ownership of said stock." Now, if this be true—and we are bound to regard it as true, unless the arbitrators were guilty of fraud, partiality or corruption—then the Columbus Bridge Company was, in fact, but a chartered partnership; and the settlement of all difficulties existing between King and Jemison, the partners and owners of all the stock, was necessarily a settlement of all difficulties between the bridge-company and each of the partners. We hold, then, that on the face of the award, the matter or controversy submitted does appear to have been determined.

[3.] The testimony offered by King, when the award was sought to be made the judgment of the court, could, at most, only tend to disprove one of the facts recited and found by the arbitrators—namely, that the said King and Jemison were equal owners of all the stock in said bridge-company. If facts found by arbitrators could be retried and overturned in this way, arbitrations, instead of being a mode of settling disputes, would become the initiatory step to litigation. This, too, in direct opposition to the statute, which declares they are final, unless attacked for fraud, partiality or corruption.—Code, § 2721. There was no error in disregarding that testimony.—*Young v. Leaird*, 30 Ala. 371.

[4.] The appellee, Jemison, under the agreement endorsed on the record, assigns as error the judgment of the circuit court in quashing the execution issued by the clerk. This assignment must be sustained. It is true that, under section 2710 of the Code, the award, if not performed, is directed to be entered up as the judgment of the proper court. It is equally true that, under section 2714 of the Code, the award has the force and effect of a judgment at law, upon which execution may issue as in other cases, if the award is not performed in ten days after notice and delivery of copy. There is no right to have an execution, or to have the award made the judgment of the court, if the award is performed as contemplated by the statute. If the award is not performed within ten days after notice of the award and delivery of a copy thereof, then execution may be sued out. If a term of

the circuit court be held in the county, in which the award is made, before such award is performed, then the award may be made the judgment of the court.

The judgment of the circuit court, so far as the same is appealed from by King, is affirmed. The judgment of the court quashing the execution is reversed. Let the appellant, King, pay the costs of the appeal.

WILLIAMSON'S ADM'R *vs.* ROSS.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR PURCHASE-MONEY OF LAND.]

1. *Equitable estoppel against assertion of vendor's lien.*—A court of equity will not enforce a lien for the unpaid purchase-money of land, at the suit of an administrator of the deceased vendor, when it appears that the purchaser also is dead; that his estate was duly declared insolvent, and settled as such; that the land was sold, under an order of the probate court, as belonging to his estate; that the vendor's administrator was a bidder at the sale, and publicly stated that the purchaser would get a good title; and that he filed the notes for the purchase-money as claims against the purchaser's estate, and received his *pro-rata* share of the proceeds of the sale of the land, which he does not offer in his bill to return or account for.

APPEAL from the Chancery Court of Randolph.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by Hugh Montgomery, as the administrator *de bonis non* of George Williamson, deceased, against Frederic Ross and John T. Heflin; and sought to enforce a vendor's lien for the unpaid purchase-money of a tract of land, which the said Williamson had sold to one Andrew Burnham, and which the said Ross, through Heflin as his agent, bought at a public sale, which was made under an order of the probate court by the administrator of said Burnham, whose estate had been previously declared insolvent. The material facts, as disclosed by the bill, answers and testimony, will be readily understood from the opinion of the court. On final hear-

ing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

J. W. GUINN, for the appellant.

JNO. T. HEFLIN, *contra*.

RICE, C. J.—It may be conceded, that Williamson, at the time of his death, as the vendor of the land to Burnham, had a lien on the land for the unpaid purchase-money; and that the lien can still be enforced, unless the conduct of the complainant, as the administrator *de bonis non cum testamento annexo* of Williamson, amounts to a waiver or discharge of it, or to an equitable estoppel against its enforcement by the said administrator.

It appears that the estate of Burnham, the vendee, was duly declared insolvent, and finally settled in the probate or orphans' court as an insolvent estate; that the notes for the unpaid purchase-money, given by Burnham to Williamson, were duly presented and filed by Williamson's administrator, as claims against the insolvent estate of Burnham; that upon the application of the administrator of the insolvent estate of Burnham, the land was sold, under an order of said orphans' court, to the respondent Ross; that the complainant afterwards induced Ross to consent to set aside that sale, and to consent to a re-sale; that at the re-sale the complainant stated, that the purchaser would get a good title, and was one of the bidders, but the respondent Heflin became the purchaser, for Ross; that the proceeds of the re-sale, (which were greater than the proceeds of the first sale,) were, in the administration of Burnham's estate in the insolvent course, equally divided between all the creditors of Burnham's estate; and that the complainant, as administrator of Williamson, and as one of those creditors, with a full knowledge of the facts, received, with the other creditors, a *pro-rata* share of the proceeds of the re-sale, which he does not even offer to restore or return, but retains as so much money collected on the notes given to Williamson by Burnham for the purchase-money.

There can be no doubt that the creditors or legatees of

Williamson can compel the complainant to account to them (if he has not already done so) for the *pro-rata* share of the proceeds of the re-sale received by him as aforesaid. For aught that appears in the present case, they may have received the same from him; or, if not, they may prefer to look to him for the same, rather than incur the expense and hazard of a resort to a court of equity, to enforce the lien for the purchase-money which remained unpaid at the death of Williamson. In this aspect, the present suit may be against their wishes and rights, if not against their interest, and may be a suit prosecuted by the administrator for his own benefit only—that is, to relieve himself from the condition in which, by his conduct at, and before, and since the re-sale, he has voluntarily placed himself, with a full knowledge of the facts. Construing the bill most strongly against him, as we ought to do, we are authorized so to consider this suit; and thus considering it, we think there is no equity in relieving the complainant from the consequences of his own conduct, at the expense and to the prejudice of Ross, who purchased and paid for the land in good faith, and under the belief, strengthened, if not created, by the statement of the complainant, that “the purchaser would get a good title.”

It is very clear, that neither the complainant, nor the creditors or legatees of Williamson, can justly claim to retain the money which Ross paid for the land on the re-sale, and also to have the land sold again to satisfy the alleged vendor's lien. The bill in this case does not show that the creditors or legatees take any part in setting up any such unjust claim, nor are they parties to the bill. The administrator, who, after stating that the purchaser would get a good title, after Ross had become the purchaser and paid the money, receives a *pro-rata* share of the money Ross paid for the land, and, without offering to restore it, asks the court of equity to sell the same land again to satisfy the very debt on which he had received his *pro-rata* share of the money paid by Ross—that administrator is the only party complaining, and the only party that we can say from the record would be ben-

effited by the decree which he seeks by his bill. As the case is now presented, *he* cannot enforce the lien he asserts. His own conduct *estops* him from enforcing it. He shows nothing to relieve him from the estoppel arising out of his conduct.—Butler v. O'Brien, 5 Ala. 316; Firemen's Ins. Co. v. Cochran, 27 Ala. 228; Stone v. Britton, 22 Ala. 543; Fambro v. Gantt, 12 Ala. 298; Lawson v. Lay, 24 Ala. 184; Elliott v. The Br. Bank at Mobile, 20 Ala. 345; Atwood v. Wright, 29 Ala. 346; see also the cases cited for appellee.

The decree of the chancellor is affirmed.

SEVIER vs. THROCKMORTON.

[GARNISHMENT ON JUDGMENT.]

1. *Waiver by garnishee of judgment discharging him.*—If an issue is made up between a garnishee and the attaching creditor, contesting the garnishee's answer, after the rendition of a judgment discharging him on his answer, and such issue is tried without objection on his part, he must be considered as having waived the judgment discharging him, and cannot invoke it in the appellate court as precluding the plaintiff from assigning errors upon the rulings of the court on the trial of the issue.
2. *Garnishee's answer not evidence for him.*—When the answer of a garnishee is contested by the attaching creditor, although the *onus* is on the plaintiff, the answer itself is not evidence for the garnishee.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. JOHN E. MOORE.

THE record in this case shows these facts: On the 27th September, 1852, John Sevier obtained a judgment in the circuit court of Franklin county, against one John L. Bunch, for \$251 71 debt, and \$13 38 damages, besides costs; and on the 7th November, 1856, sued out process of garnishment thereon, and summoned James Throck-

morton as the debtor of said Bunch. At the ensuing spring term of the court, the garnishee filed an answer, denying all indebtedness to the defendant; which answer was sworn to and subscribed, before the clerk of the court, on the 31st March, 1857. At the same term, but on what day the record does not show, the court rendered a judgment, discharging the garnishee on his answer. On the 1st April, 1857, the plaintiff made affidavit before the clerk, contesting the correctness of the garnishee's answer; and the garnishee joined issue thereon. On the trial of this issue, at the spring term, 1858, the court instructed the jury, "that the garnishee's answer was evidence for him;" to which the plaintiff excepted, and which he now assigns as error.

WM. COOPER, and J. B. MOORE, for the appellant.

F. G. NORMAN, and R. B. LINDSAY, *contra*.

WALKER, J.—After the rendition of a judgment discharging the garnishee on his answer, the plaintiff and the garnishee went to trial on an issue, in which the former affirmed the incorrectness of the answer, and the latter asserted the contrary. A jury was empaneled, and the issue tried, without objection by either party; and a verdict was returned for the garnishee; and thereupon a judgment was rendered for the garnishee. The garnishee must be understood to have waived the judgment of discharge upon his answer, and the cause as continued in court by the act of the parties. The plaintiff, therefore, is not precluded from assigning errors upon the rulings of the court, on the trial of the issue before the jury, upon the ground that there was no cause in court. *Byrd v. McDaniel*, 26 Ala. 582.

[2.] Upon the trial of the issue as to the correctness of the answer, the answer of the garnishee was not evidence for him. The *onus* of proof is upon the party contesting the answer; but the statute does not make the answer evidence for the garnishee upon the trial of the issue. If it were, the garnishee would be a witness in his own

case, without any corresponding privilege to the opposite party.

The judgment of the court below is reversed, and the cause remanded.

GARRETT & BIBB vs. TERRY.

[APPLICATION FOR REHEARING AFTER FINAL JUDGMENT AT LAW.]

1. *Security for costs.*—An application for a rehearing after final judgment at law, (Code, § 2408,) by a non-resident defendant, is within the statute (Code, § 2396) requiring security for costs in “actions commenced by or for the use of a non-resident;” and the giving of a *supersedeas* bond does not dispense with the necessity for such security.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. ROBERT DOUGHERTY.

THIS was an application for a rehearing, after final judgment at law, under section 2408 of the Code. The application was made by the defendants in the action, who also executed a statutory bond to supersede an execution which had been issued on the judgment. The court dismissed the application, because it appeared that the petitioners, who were shown to be non-residents, had not given security for the costs of the proceeding; to which ruling of the court the petitioners excepted, and which they now assign as error.

W. B. WOOD, for the appellants.

R. W. WALKER, and E. A. O'NEAL, *contra*.

STONE, J.—If this proceeding be an *action*, within the meaning of section 2396 of the Code, our previous decisions require us to hold, that the bond given on suing out the *supersedeas* is not a security for the costs.—*Ex parte* Robbins, 29 Ala. 71; *Shepherd v. Spriggs*, 29 Ala. 673.

In *Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390-97, we held, that the petition, in cases like the present, must be regarded as a new action. The "filing of the petition" was the commencement of the action; and the failure of the petitioners to give security for the costs, justified the court in dismissing the suit.

Judgment of the circuit court affirmed.

CONNER & JOHNSON vs. ALLEN & REYNOLDS.

[TROVER FOR CONVERSION OF BUGGY.]

1. *What constitutes conversion.*—To constitute a conversion, such as will sustain an action of trover, there must be a destruction of the plaintiff's property; or some unlawful interference with his use, enjoyment, or dominion over it; or an appropriation of it by the defendant to his own use, in disregard or defiance of the owner's rights; or a withholding of the possession from the owner, under a claim of title inconsistent with his own.
2. *When conversion vel non is question for jury.*—When there is evidence tending to show a reasonable excuse for the act or conduct of the defendant, which is relied on by the plaintiff as constituting a conversion, the reasonableness and sufficiency of the excuse is a question for the jury, under proper instructions from the court.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Allen & Reynolds, against the appellants, to recover damages for their conversion of a buggy in August, 1855. The facts of the case are thus stated in the bill of exceptions:

"On the trial of this cause, the plaintiffs offered evidence conducing to show that, on the — day of —, 185—, they were the proprietors of a livery-stable in Selma, and kept horses, buggies, &c., for hire; that on that day the defendants hired a horse and buggy, at one dollar and a half for each, to go to Summerfield, about nine miles, and return that evening; that the

horse was returned that evening, but the buggy was not returned until thirty days afterwards; and that the buggy, if it had been returned, would have been worth to them one dollar and fifty cents per day during the thirty days. The defendants then proved, that they drove the horse and buggy to Summerfield, and put them in the hands of the keeper of a livery-stable at that place; that the buggy was badly broken the next time they saw it; that one of them then had it taken to a shop, to be repaired; that he did have it repaired, and returned it to plaintiffs, so repaired, at the time above stated. There was no proof of negligence on the part of the defendants, other than as above stated.

“Upon this proof, the court charged the jury, that if they believed from the evidence that the plaintiffs were the keepers of a livery-stable in Selma, and kept horses and buggies for hire; and that the defendants, at the time spoken of by the witness, hired the horse and buggy from plaintiffs, to go to Summerfield, and be returned that evening; and that the buggy was not returned for thirty days,—then the plaintiffs would be entitled to recover for the use of the buggy during that time; to which charge the defendants excepted,” and which they now assign as error.

GEO. W. GAYLE, for the appellant.

ALEX. WHITE, *contra*.

RICE, C. J.—Trover is one of the actions, the boundaries of which are distinctly marked and carefully preserved by the Code. A *conversion* is now, as it has ever been, the *gist* of that action, (Harris v. Hilman, 26 Ala. 380;) and without proof of it, the plaintiff cannot recover, whatever else he may prove, or whatever may be his right of recovery in another form of action.

“Whoever undertakes *tortiously* to deal with the property of another as *his own*, or *tortiously* detains it from the owner, is, in contemplation of law, guilty of a conversion.” Watt v. Potter, 2 Mason’s R. 77. “A conversion, in the sense of the law of trover, consists either in the appro-

priation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, *in exclusion or defiance of the plaintiff's right*, or in withholding the possession from the plaintiff, *under a claim of title inconsistent with his own*"—2 Greenleaf on Ev. § 642. But the use, or disposition, or detention of a thing, that "might be a *tort* under one circumstance, might, if done under others, assume a different appearance;" as for example, if the use, disposition, or detention, was to do a kindness to the owner, and without any intention of injury to the thing, or of converting it to the use of the person using, disposing of, or detaining it, and was merely conservative of it, and perfectly consistent with the right of the owner, and his dominion over it.—2 Greenlf. on Ev. § 643; Drake v. Shorter, 4 Esp. R. 165; Sparks v. Purdy, 11 Missouri R. 219; Watt v. Potter, 2 Mason's R. 77; Glover v. Riddick, 11 Iredell, 582; Dent v. Chiles, 5 Stew. & Por. 383.

[2.] When, as in this case, there is evidence tending to show a reasonable excuse for the act or conduct of the defendant which is relied on by the plaintiff as proving or tending to prove a conversion, the jury are to judge, under proper instructions from the court, of the reasonableness of the excuse, and whether, under all the circumstances, there has been a conversion.—Dent v. Chiles, *supra*; and Watt v. Potter, *supra*.

The charge of the court below is in conflict with the law, as above declared, and is erroneous. For the error in the charge, the judgment is reversed, and the cause remanded.

WATKINS *vs.* TUSKALOOSA AND NORTHPORT
MANUFACTURING COMPANY.

[BILL IN EQUITY BY STOCKHOLDER OF PRIVATE CORPORATION, FOR ASCERTAINMENT
AND RECOVERY OF HIS INTEREST.]

1. *When stockholder in private corporation may come into equity.*—Where an incorporated company enters into a written contract with one of its stockholders, appointing him its general agent and superintendent, and agreeing, in the event of his removal from that office, “to pay him the value of his interest as stockholder in said company, to be ascertained by a reference to two arbitrators, one to be selected by each party, with authority to them to select an umpire,”—such stockholder cannot come into equity, for the ascertainment and recovery of the value of his interest, without averring a full compliance on his part with the stipulations of the agreement, or a sufficient excuse for his failure to comply; and the fact “that the company failed, in his opinion, to appoint a suitable person as arbitrator,” is not sufficient to excuse his refusal to submit to the arbitration.

APPEAL from the Chancery Court of Tuskaloosa.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by the appellant, against the company and individual members of the Tuskaloosa and Northport Manufacturing Company, a private corporation chartered by the legislature of this State; and sought to ascertain and obtain by decree of the court the value of his interest as a stockholder in said corporation. The bill was founded on a written contract between the complainant and said corporation, which was made an exhibit to the bill, in these words:

“Memorandum of an agreement this day entered into between the Tuskaloosa and Northport Manufacturing Company and William W. Watkins. The said Watkins agrees to subscribe one hundred shares, being \$10,000, to the stock of said company; in consideration of which, the said company agrees to appoint said Watkins the superintendent and general agent of the mill of said company; and as such superintendent and general agent of the mill of said company, the said Watkins is to purchase

cotton and other materials to be wrought at said mill, and to sell and dispose of the manufactured fabrics; to employ and pay off all laborers, overseers, and hands; to keep the mill supplied with everything necessary to its successful operation; to keep the books of the company; to manage and regulate its fiscal affairs, and to direct, control and manage generally the business of the company, under the direction of the board of trustees; the salary of said superintendent to be \$1200 *per annum*, payable quarterly. And should the stockholders of said company, or the board of trustees, remove the said Watkins, or abolish or lessen his salary, then the said company agrees to pay the said Watkins the value of his interest as a stockholder in said company; to be ascertained by a reference to two arbitrators, one to be selected by each party, with authority to select an umpire; unless the parties can themselves agree upon the value of said interest. It is further agreed, that the stipulations of this contract shall not be obligatory, until \$50,000 of stock in said company is subscribed, over and above the subscription of said Watkins. In witness whereof, John R. Drish, president of said company, and the said Watkins, have hereunto set their hands and seals, this 8th June, 1852.

JOHN R. DRISH, [SEAL,]

Pres. Tuska. and N. P. Man. Co.

W. W. WATKINS, [SEAL.]”

At the foot of this contract, the individual stockholders of the company signed their names to an agreement in these words: “The undersigned, stockholders in the Tuskaloosa and Northport Manufacturing Company, do hereby guaranty the performance of the stipulations entered into by the said company in the foregoing agreement, should said Watkins be removed from the agency and superintendence of the company’s mill, or his salary be reduced.”

The bill alleged, that on the 17th June, 1852, the additional \$50,000 having been previously subscribed, he paid the \$10,000 subscribed by him under this contract, was appointed general agent and superintendent of the company as stipulated, and entered on the discharge of his

duties as such; that in December, 1853, the stock of the company was increased to \$100,000, of which complainant owned one hundred and thirty-five shares; that on the 19th September, 1856, by resolution of the board of trustees, he was removed from the said office, and one R. C. McLester was appointed in his stead; that the company at that time had declared no dividends to its stockholders; that it neglected and refused to settle with him, as stipulated in said contract, on account of his interest as a stockholder; that he and the committee appointed by the company "were unable to agree, either upon the value of his stock, or the amount of shares covered by said contract;" that an effort, made between himself and the company, "to have the value of his interest as a stockholder ascertained, failed, because the parties could not agree upon the arbitrators,—the said company failing, in his opinion, to nominate a suitable person who was willing to undertake the reference; and he was therefore compelled to revoke the authority to arbitrate." The prayer of the bill was for an account, in order that the complainant's interest might be ascertained, and for general relief.

The chancellor sustained a demurrer to the bill for want of equity, and his decree is now assigned as error.

J. J. ORMOND, for the appellant.

E. W. PECK, and W. R. SMITH, *contra*.

RICE, C. J.—The bill is filed by Watkins, to obtain a decree for the value of his interest as a stockholder in the Tuskaloosa and Northport Manufacturing Company. He founds his right to a decree upon the agreement set forth in "Exhibit A" to his bill.

But he is not entitled to the decree which he seeks, unless he has done, or offered to do, all that the agreement required him to do, or shows a valid legal excuse for not having done or offered to do all that the agreement required him to do.

The agreement clearly required him to refer, or to offer to refer, the ascertainment of the value of his interest as

a stockholder in said company "to two arbitrators, one to be selected" by him, and one by the company, with authority to select an umpire; for it was the value *thus to be ascertained* that the express words of the agreement bound the company to pay. Now the statements of his bill, when construed most strongly against him, as they must be, fail to show that he has so referred or offered to refer the ascertainment of the value, or that any valid legal excuse existed for his failure so to refer or to offer so to refer. The allegation of his bill in relation to that matter is as follows: "An effort made by the company and orator, to leave the value of orator's interest as a stockholder to be ascertained by an arbitration, failed, *because* the parties could not agree upon the arbitrators; the said company failing, *in the opinion of orator*, to nominate a *suitable* person, who was willing to undertake the reference, and orator was *therefore* compelled to revoke the authority to arbitrate."

This allegation shows, that Watkins was not even willing that the value of his interest as a stockholder should be ascertained in the mode provided for in the agreement, unless the company, in selecting the referee whom it had the right by the agreement to select, would choose one that Watkins *thought* was suitable. It is very certain that, if the company was willing to select a referee who was in fact suitable, Watkins' *opinion* that he was unsuitable could not excuse Watkins for preventing the ascertainment of the value in the mode provided for in the agreement. The bill does not even allege the unsuitableness of the referee who was selected or about to be selected by the company; but alleges only *the opinion* of Watkins that he was unsuitable.

Whether, after Watkins has in vain done, or offered to do, all that the agreement requires him to do, in order to get the value of his interest ascertained in the mode therein specified, he may not be entitled to invoke the aid of the chancery court, we shall not now consider. But it is clear that, without doing, or offering to do, more than his bill shows he has done or offered to do, to have the value of his interest as a stockholder ascertained in

the mode specified in the agreement, he has no right to relief in such a court. His bill contains no equity, and was, therefore, properly dismissed.

The decree of the chancellor is affirmed, at the costs of appellant.

SESSIONS' ADM'R vs. SESSIONS.

[BILL IN EQUITY BY WIDOW AGAINST HUSBAND'S ADMINISTRATOR.]

1. *Respective interests of husband and wife in proceeds of sale of wife's land.*—Where lands, descended to the wife in 1847 during coverture, were sold and conveyed by her and her husband jointly in 1854; and a note taken for part of the purchase-money, payable to the husband, did not mature until after his death,—*held*, that the sale operated a conversion of the realty into personalty, but did not divest the wife's interest in the proceeds of sale; and that the entire interest in the note given for the purchase-money, except the annual interest which had accrued at the death of the husband, became the wife's separate estate under the Code.
2. *When widow may come into equity against husband's administrator.*—A widow cannot maintain a bill in equity against the administrator of her deceased husband, to recover money collected by the administrator on a note given for the purchase-money of the wife's land, when it appears that the entire interest in the note, except the annual interest which had accrued up to the death of the husband, belonged to the wife's separate estate under the Code: her remedy at law, in such case, is clear, adequate, complete, and exclusive.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Mrs. Lydia Ann Sessions, against the administrator of her deceased husband, John B. Sessions, and alleged the following facts: That the complainant and her said husband were married about the year 1840; that in 1847, her father, Thomas Bowman, departed this life in said county, leaving her his only child and heir-at-law; that no administration was ever taken out on his estate, because it was entirely free from debt;

that said Bowman died seized and possessed of a large tract of land in said county, of which complainant and her husband took possession on his death, and which they continued to hold until April, 1851, when her husband sold a portion of it to Mrs. Ann McNeill, received the purchase-money, and converted it to his own use; that complainant joined with her husband in the execution of a conveyance to Mrs. McNeill, which was duly acknowledged and recorded; that on the 17th January, 1854, her husband sold another portion of said land to one Richard C. Parker, at and for the price of \$2,400; that she joined with her husband in the execution of a deed to said Parker, which was duly acknowledged and recorded; that her husband received \$400 of the purchase-money in cash at the time of said sale, and, without her knowledge or consent, took Parker's note for the balance, payable to himself, and due on the 1st January, 1855; that her husband afterwards died, before the maturity of said note, which Parker paid at maturity to the defendant, as his administrator; that his estate was largely insolvent, unless this money should be applied to the payment of his debts; and that complainant had no separate estate, except about one hundred and sixty acres of the land still remaining unsold. The bill prayed an injunction against the administrator, to restrain him from using or applying the money as assets of his intestate's estate; that he might be declared to hold said money as trustee for complainant, and be directed to pay it over to her; and the prayer for other and further relief was added.

The administrator answered the bill, denying all its allegations, and demurring to it for want of equity.

The only testimony in the cause was the deposition of said Parker, which was taken by the complainant. This witness proved the death of Bowman, but without specifying the time; that Mrs. Sessions was his only child and heir-at-law, and inherited from him a large tract of land in said county; that he (witness) bought a portion of this land, (not stating from whom,) paid a portion of the purchase-money in cash to John B. Sessions, gave his note for the balance, which he delivered to said Sessions in the

presence of his wife, and afterwards paid said note to the defendant as his administrator.

The chancellor overruled the demurrer to the bill, and, on final hearing, rendered a decree for the complainant, which is now assigned as error by the administrator.

WATTS, JUDGE & JACKSON, for the appellant.

D. W. BAINE, *contra*.

RICE, C. J.—It seems to be conceded in the arguments of the counsel, that if the bill contains any equity, it is only in relation to the sale of the lands to Richard C. Parker, and the proceeds of that sale; and inclining to the opinion that the concession is correct, we shall treat it as correct, and proceed to examine whether there is any equity in that feature of the bill.

It is clear that *the lands* never belonged to complainant, as her *separate estate*; because they descended to her as the only child and heir of her father, during her coverture, in 1847, and before the passage of any statute declaring lands thus accruing to a married woman to be her separate estate.

During the life of her husband, he, as well as she, had rights in respect to the lands. His rights were simply those of a tenant by the curtesy. Subject to those rights of the husband, the lands were her property. The Code (§ 1282) authorized her to join a conveyance of them to any *third person*; but section 1985 of the Code prohibits husband and wife from contracting with each other for the sale of any property. The conveyance of the lands by her and her husband to Parker, was executed after the Code went into effect; and the Code, of course, applies to that transaction. Her joining in that conveyance, *under the Code*, cannot be construed as divesting her of all right, both to the lands, and to the price which Parker agreed to pay for them. As she and her husband each had, at that time, rights in respect to the lands, as above stated, and a capacity to convey them to a *third person*, it is more natural and just to construe the transaction on their part

as a designed *conversion* of the *realty* into *personalty*. Viewed in this light, the *personalty* was *new property* acquired during coverture, and under the Code. In this new property thus acquired, the husband and wife each had rights. The right of the husband in it, whether measured by the woman's law found in the Code, or by the extent of his rights in the realty, which had been converted into the new property, did not embrace more than the profits (that is, the annual interest) which accrued on the new property (the note of Parker) up to the death of the husband. The right of the wife in the new property (the note of Parker) embraced all of it, except the annual interest which had accrued up to the death of her husband, and became her *separate estate* by virtue of the Code. Code, § 1982. This right of the wife ought not to be treated as assets of her husband's estate.

If it be conceded that, before the collection of this note, the complainant's husband in his life-time, and his administrator after his death, held it in trust for complainant, to the extent of her interest therein; yet, when the trust, by the collection of the note, became a mere money transaction, then, although originating in a trust, the claim in favor of complainant assumed the character of a debt; and, therefore, cannot be enforced in a court of equity—the remedy at law being clear, adequate, complete, and exclusive.—*Maury v. Mason*, 8 Porter, 211; *Huckabee v. Andrews*, 30 Ala. 143.

It follows, that complainant's bill contains no equity; that the decree of the chancellor must be reversed, and the bill be dismissed for want of equity. The complainant must pay the costs of this court, and of the court below.

COCKRELL vs. MCGRAW.

[ACTION COMMENCED BY ORIGINAL ATTACHMENT.]

1. *Motion to quash attachment by stranger to record.*—An original attachment, regular on its face, and supported by a regular affidavit, cannot be quashed, on the motion of a stranger to the record, “who is shown to have an interest in the question and motion,” for matter *dehors* the record, which is properly triable by a jury.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. A. A. COLEMAN.

THE record in this case shows the following facts: On the 19th January, 1858, the appellant sued out an original attachment, before the clerk of the circuit court, against the estate of Washington L. McGraw; having made the statutory affidavit, and given bond as required by law. At the return term of the attachment, as the bill of exceptions states, two attorneys of the court, “as *amici curiæ*, and at the instance of John M. Sprowl, who was shown to have an interest in the question and motion, moved the court to quash the attachment, on the following grounds: 1st, that the attachment was not issued by any person authorized to issue it; and, 2d, that said attachment purports to have been issued by W. Kilpatrick, as clerk of this court, when it was not in fact so issued.” On the evidence submitted in support of this motion, which it is unnecessary to state, the court quashed the attachment; to which the plaintiff excepted, and which he now assigns as error.

H. S. SHELTON, for the appellant.

TURNER REAVIS, *contra*.

RICE, C. J.—A suit may be commenced by original attachment; and when thus commenced, the attachment is the leading process in it.

If the attachment be issued without the affidavit and bond prescribed by the Code, it "may be *abated on plea of the defendant*, filed within the three first days of the return term."—Code, § 2561.

The Code further provides, that all pleas *in abatement*, unless it be of matter of record, must be verified by affidavit, (Code, § 2238;) and that the attachment law must be liberally construed, to advance the manifest intent of the law,—Code, § 2562.

The attachment, in the case at bar, is not assailed by plea, nor for any defects apparent upon the face of it, or of the affidavit, or of the bond, nor by the defendant; but it is assailed by a motion to quash, made by two gentlemen "as *amici curiæ*, and at the instance of John M. Sprowl, who was shown to the court to have an interest in the question and motion;" and the motion is predicated upon two specified grounds, neither of which is verified or supported by any thing apparent upon the attachment, affidavit, or bond of the plaintiff, nor by any affidavit. No question, therefore, is now presented, as to the right of the defendant in attachment, or of persons who are privies in interest, to found a motion to quash *upon defects apparent on the face of the attachment and affidavit*. It may be conceded, that a plea in abatement is not necessary to entitle the defendant, or any privy in interest, to make *such defects* available to defeat the proceeding.—Reid v. McLeod & Co., 20 Ala. R. 576. But the question here is, whether an original attachment, regular upon its face, and supported by an affidavit regular upon its face, can be quashed, on the motion of a person not a party to the record, but who has an interest in the question and motion, for matter *dehors* the record, and which is properly triable by a jury. We cannot hesitate to decide that question in the negative. A person, not a party to the record or suit, cannot be thus permitted to intervene and tender an issue upon matter *en pais*, without violating the rules of pleading, and the manifest intent of the attachment law.—Edwards v. Lewis, 16 Ala. 813.

It does not follow, that because such a person cannot make such a motion, he is without remedy, if he can

show himself injuriously and illegally affected by the attachment.—See Perkins v. Reed, 14 Ala. Rep. 536; Milman v. Levy, 7 Georgia R. 167; Matthews v. Sands, 29 Ala. R. 136.

The court below erred in granting, instead of overruling the motion to quash. Its judgment is, therefore, reversed, and the cause remanded.

MCKENZIE vs. CLANTON.

[ACTION ON BILL OF EXCHANGE, BY ENDORSEE AGAINST ENDORSER.]

1. *Damages against payee and acceptor.*—In an action against the payee and endorser of an inland bill of exchange, duly protested for non-payment, the mere fact that the bill was addressed to, and accepted by the defendant, does not relieve him from the payment of damages.
2. *When writ of inquiry is unnecessary.*—In an action on an inland bill of exchange, duly protested for non-payment, by endorsee against payee as endorser, the statute (Code, § 2366) authorizes the rendition of a final judgment by default, without the intervention of a jury, for the amount of the bill, with interest and damages.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. S. D. HALE.

The complaint in this case was as follows:

“Albert B. Clanton } The plaintiff claims of the de-
 vs. } fendant the sum of nine hundred
 John McKenzie. } and eighty-four dollars, by bill of
 exchange, dated Girard, Alabama, December 12, 1856,
 due the 1st June, 1857, drawn by Horace King on, and
 accepted by the defendant, and payable at the Central
 Bank of Alabama at Montgomery, on the 1st June, 1857,
 to the order of the defendant, and by him endorsed;
 which bill has been protested for non-payment, with all
 interest and damages thereon; and the plaintiff avers, that
 said bill of exchange is his property.”

Judgment final by default was rendered, without the intervention of a jury, "for the sum of eleven hundred and seventeen 45-100 dollars, the damages in the complaint mentioned, together with the costs," &c.; and the rendition of this judgment is now assigned as error.

THOS. WILLIAMS, for the appellant.

JAMES E. BELSER, *contra*.

RICE, C. J.—The assignments of error in this case raise two questions.

The first is, whether the payee and endorser of an inland bill of exchange, duly protested for non-payment, is relieved from the payment of damages, by the mere fact that the bill was addressed to, and accepted by him. We decide that in the negative.—Code, § 1537; Story on Bills of Exchange, §§ 108-111.

The second is, whether, in a suit on such bill against the endorser, the court can, without the intervention of a jury, render a final judgment by default against him, for the amount of the bill, with the interest and damages due thereon. We decide that in the affirmative, upon the authority of section 2366 of the Code.

Judgment affirmed.

HOLLOWAY *vs.* COTTEN.

[ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF SLAVE.]

1. *Admissibility of slave's declarations*.—The declarations of a slave, complaining of sickness, and detailing her symptoms, are competent evidence on the principle of *res gestæ*, as well as from the necessity of the case, though made to a person who is not a physician; *secus*, as to her declarations, to the effect "that she had been that way, off and on, for the last year or two."
2. *Charge on question of damages, excluding portion of evidence from consideration of jury, erroneous*.—Plaintiff having introduced a physician as a witness, who testified that, in his opinion, the slave whose soundness was in controversy

was diseased at the time of the sale, and valueless; and there being no evidence of the actual value of the slave at that time, if she was not valueless,—it is error in the court to instruct the jury, “that if they were satisfied that the slave was unsound at the time of the sale, and if they believed the testimony of said physician as to her worthlessness, then they must find the full value of the slave for the plaintiff, although, on the whole proof, they might believe that the disease did not render her wholly valueless.”

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Thomas S. Cotten, against Caleb Holloway, to recover damages for the breach of a warranty of soundness of a slave named Maria, sold by defendant to plaintiff in January, 1854. No pleas appear in the record. On the trial, as the bill of exceptions states, the plaintiff read in evidence his bill of sale for the slave, containing a warranty of soundness, and then introduced one Phillips as a witness, who testified as follows: “In March, 1854, some two months after the sale of said negro by defendant to plaintiff, witness was assisting plaintiff in making hill-side ditching, and Maria was engaged in working on the ditches, clearing out the same with a weeding-hoe. Witness saw her leaning on a stump; her eyes were rolling about in her head, and her breath was very short. When asked what was the matter, she said, ‘that she was sick; that it would soon wear off; *and that she had been that way, off and on, for the last year or two.*’ Witness was not a physician.” The defendant objected to the admission of the last part of the slave’s declarations, which is italicized, and reserved an exception to the overruling of his objection.

The plaintiff also introduced his own son as a witness, who was not a physician, and who testified, “that he carried Maria home from the defendant’s house, on the day after the sale, in a two-horse wagon; that said slave, while they were going on, got out to walk, and, after walking about a half-mile, seemed to be out of breath, and complained of being sick, and of having shortness of breath.” The defendant objected to this evidence, and reserved an exception to the overruling of his objec-

tion. The plaintiff also offered one Oliver as a witness, who testified, "that he was not a physician; that he was at plaintiff's house, one Sunday evening in March, 1854, and saw Maria in bed; that she seemed to be much distressed, and said, on his inquiring of her what was the matter, 'that she was sick at the stomach, and had shortness of breath.' The defendant objected to this evidence also, and excepted to the overruling of his objection.

"The plaintiff then introduced the evidence of physicians, tending to prove that said slave was diseased at the date of the bill of sale—that her womb was greatly enlarged, and had a large tumor on it; that two of them made a *post mortem* examination of her, took out the womb, &c.; and one of them testified, that said slave, if she had been sound, would have been worth \$400, but, in her unsound condition, was valueless in his opinion. He further proved, that about the middle of March, 1854, said slave was badly burned one Sunday night, by her clothes catching fire; that her mouth, neck, and breast were badly burned, also the lower part of the abdomen, and the entire surface, from the hip down to the knee, on the right side; that she lived some ten or fifteen days afterwards, and died from the effects of said burning.

"The defendant then introduced evidence conducing to show that said slave was sound and healthy at the date of the bill of sale; and introduced physicians who testified, that sometimes women, of the age of said slave, (which was proved to be between fifty and fifty-five,) had enlargement of the womb, and sometimes tumors on the womb, without much impairing their health; that after women pass a certain age, called 'change of life,' (which generally takes place between forty and fifty,) it is usual for the womb to become enlarged; and that, in some instances, these enlargements affect their health but little, if at all. One of said physicians gave it as his opinion, that if the womb of said slave was only enlarged, it would not render her entirely valueless; that it might impair her value but slightly, &c.

"This was, in substance, the evidence in the case. No evidence was offered by either party, as to what was the

value of said slave, provided she was not so diseased as to render her wholly valueless; or as to the difference between her value if sound, and her value if only slightly diseased.

"The court charged the jury, among other things, 'that they might consider the declarations of the slave Maria, along with the other evidence in the case, to ascertain whether she was unsound at the date of the sale; that they had heard under what circumstances these declarations were made, and might give them such weight as they thought proper;' to which charge the defendant excepted.

"After the court had concluded its charge to the jury, the plaintiff's counsel suggested, that the court had not instructed the jury in one phase of the case—viz., what the jury should do, if they found that the slave was diseased at the time of the sale, and not so diseased as to render her valueless. The court replied, that no proof had been made on that point; and then instructed the jury, (neither party offering any further proof,) 'that as the plaintiff had introduced the evidence of a physician, who gave it as his opinion that the slave was diseased at the time of the sale, and that said disease rendered her valueless; and there being no evidence as to what her value was, if the disease did not render her wholly valueless,—if they were satisfied that said slave was unsound at the time of the sale, and believed the evidence of said physician as to her worthlessness, then they must, under the proof, find the full value of said slave for the plaintiff, although, on the whole evidence, they might believe that the disease did not render her wholly valueless; and that, in ascertaining the value of said slave, they might take the price agreed on between the parties themselves as the value of said slave.' To this charge, also, the defendant excepted."

All the rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

BROCK & BARNES, for the appellant.

RICHARDS & FALKNER, *contra*.

RICE, C. J.—Upon the authority of *Eckles v. Bates*, 26 Ala. 655, we hold, that the court below erred in admitting the declaration made to the witness Phillips, who was not skilled in the science of medicine, that “she had been that way, off and on, for the last year or two.”

Upon the authority of the case above cited, and of *Phillips v. Kelly*, 29 Ala. 628, we hold, that there was no error in admitting the other declarations of the slave which were objected to by the defendant. See, also, the authorities cited in *Phillips v. Kelly*, *supra*.

The charge of the court, in relation to the declarations of the slave, is erroneous, in so far as it authorized the jury to consider the declaration of the slave, herein first above mentioned, in ascertaining whether she was unsound at the time of the sale. In other respects, and as to the other declarations, that charge is defensible.

The law required the jury to weigh the whole evidence; and no matter what any one of the witnesses may have testified, as to the unsoundness and worthlessness of the slave, yet, if “*on the whole proof*” the jury “believed the disease did not render her wholly valueless,” the court below should not have exacted of them to find “the full value of the slave for the plaintiff.”—*Watson v. Anderson*, 13 Ala. 202; *Roberts v. Fleming*, 31 Ala. 683.

In so far as the last charge of the court below conflicts with this statement of the law, it is certainly erroneous. We deem it unnecessary to say anything more as to that charge, or to reiterate the measure of damages applicable to any phase in which cases like this may be presented. In that respect, our former decisions are sufficient to guide the court below to a correct result.—See *Roberts v. Fleming*, 31 Ala. 683.

For the errors above noticed, the judgment of the court below is reversed, and the cause remanded.

DONALD & CO. *vs.* HEWITT.

[BILL IN EQUITY TO ENFORCE FOREIGN LIEN ON STEAMBOAT.]

1. *Conflict between foreign and domestic liens on steamboat.*—A lien on a steamboat, created by a foreign statute, for work, materials, &c., cannot operate to defeat a lien acquired by attachment or libel in this State, where the boat had been brought, before the foreign lien was set up.
2. *Difference between statutory and contract liens.*—A contract between a workman and a part owner of a steamboat, providing that the former, having constructed and erected an engine on the boat, “shall retain a special lien on said boat and engines until the notes (given for the price) are paid,” creates a lien independent of statutory provisions conferring liens on workmen and material-men.
3. *Meaning of term lien.*—Whatever may have been the import of the word *lien* at common law, as applicable to cases in which a party had a right to retain the possession of property until a demand was satisfied, it has acquired in our law a more extended signification, and may include an equitable mortgage, where there is no right to retain possession of the thing itself.
4. *Equitable mortgage.*—A contract, under seal, between a workman and one of the part owners of a steamboat, by which the former agreed to make and put up an engine on the boat, and the latter agreed to pay him a stipulated sum in cash, and to give three notes or acceptances for another sum, payable four, six, and eight months after date; and by which it was stipulated, that, for the better security of the payment of the said notes, the workman should retain a special lien on said boat and engine until the notes were paid,—creates an equitable mortgage in favor of the workman, which is not dependent for validity on his retention of the possession of the boat.
5. *Conflicting liens of equitable mortgage and attachments.*—The lien of an equitable mortgage on a steamboat, created by contract in a foreign State, is superior to that of an attachment or libel levied on the boat here, at the suit of creditors who are not entitled to protection as innocent purchasers for valuable consideration without notice.
6. *Proviso to registration law, respecting property removed from another State.*—The statute of 1823, (Clay’s Digest, 255, § 4,) postponing the lien of an unrecorded mortgage in favor of creditors without notice, contains an express exception as to persons “who shall have removed from another State;” consequently, it has no application where the mortgagee files a bill to enforce his lien within twelve months after the property is brought into this State.
7. *Kentucky registration statute construed.*—The registration law of Kentucky, relative to “deeds of mortgage or deeds of trust,” as pleaded in this case, applies to an equitable mortgage, which merely creates a charge on property.
8. *Validity of mortgage not affected by changing form of security, or blending new debt.*—The validity of an equitable mortgage, created by contract, is not

- affected by the fact that the notes actually given did not correspond with those contemplated when the contract was made, or that they were made to include an additional indebtedness not provided for by the contract.
9. *Authority of partner and part owner.*—One partner has authority to incumber the entire interest in the personal property belonging to the partnership, for the security of its debts; but the mere fact that two persons jointly own a steamboat, does not constitute them partners in the boat, nor does it confer any power on one, in the absence of a special authority from the other, to bind the entire interest in the boat by a contract for work or materials.
10. *What debts are included in contract lien.*—A lien on a boat for a specific amount, created by contract between the owners and a workman, cannot be held to include a debt incurred for additional work outside of the contract, when it is not alleged that such additional work was done on the faith of the lien, or that there was an agreement between the parties that the lien should be enlarged to include the price of such work.
11. *Endorsement on enrollment of steamboat construed to create lien.*—An endorsement on the enrollment of a steamboat by the inspector of customs, made by the directions of the owner, declaring that "S. & H. hold a lien on said boat to secure the payment of six drafts," (given for work done on the boat,) "and this endorsement to be continued on all enrollments issued for the boat, until all the above drafts are fully paid, and S. & H. fully satisfied;" by which memorandum, it was averred, the owner "acknowledged, admitted, declared and gave a lien" for the entire indebtedness secured by the drafts, part of which was already secured by a special lien on the boat created by prior contract,—is the declaration of a valid trust, which a court of equity will sustain and enforce. (WALKER, J., *dissenting*, held, that the endorsement was not designed to evidence the declaration of any new trust, but was simply intended to give notice of a pre-existing statutory lien.)
12. *Writing held insufficient to create contract lien.*—A written instrument, signed by the master and principal owner of a steamboat, and filed with the boat papers in the office of the inspector and collector of customs; acknowledging an indebtedness on account of certain drafts which were given for work and materials for the boat, and adding, "the mortgage or lien to continue on the boat-papers, as security for these drafts, until finally paid and released,"—does not create or evidence a contract lien on the boat, but is merely intended to give notice of the existence of a statutory lien.

APPEAL from the Chancery Court at Montgomery.

Heard before the Hon. WADE KEYES.

THE original bill in this case was filed by Schnetz & Hewitt, of Louisville, Kentucky, on the 3d August, 1850. Its object was to enforce and assert a lien on the steamboat *J. Morrisette*, then lying at the wharf in Montgomery; to enjoin further proceedings under certain attachments and libels, which had been levied on said boat, in favor of sundry creditors of the boat and her owners; to have the complainants' lien declared superior to that of

the other creditors, and for a sale of the boat to satisfy their demand. The complainants' lien was created by a contract entered into between themselves and Thomas Moore, who owned seven-eighths of the boat; the remaining one-eighth belonging to one Jackman. This contract was made an exhibit to the bill, and was as follows :

“Louisville, July 6, 1849.

“This memorandum and article of agreement, made and entered into this day, by Schnetz & Hewitt, of the first part, and Thomas Moore, of the second part, (all of the city of Louisville, and State of Kentucky,) *witnesseth*, that the said Schnetz & Hewitt covenant and agree, and by this article bind themselves, to make and put up on board a steamer at the wharf at Louisville, for the said Moore, two engines,” &c., (which, with the other work to be done by them, is particularly described,) “all of said work to be completed on or before the 22d day of October, 1849, or as soon after as the boat being ready on the 1st October, say twenty-five days after the boat shall be ready to receive the engines. For and in consideration of the fulfillment of the foregoing contract by said Schnetz & Hewitt, the said Thomas Moore covenants and agrees, and by these presents binds himself and the other owners of said boat, to pay, or cause to be paid to the said Schnetz & Hewitt, the sum of sixty-eight hundred dollars, in this manner—viz., one-half cash during the progress of the work, and the balance in three payments, in equal notes or acceptances made by said Moore, and due four, six and eight months after drawing, bearing interest, and payable in New Orleans. And for the better security of the payment of said notes, said Schnetz & Hewitt are to retain a special lien on said boat and engine, until the notes are paid. In witness whereof, the parties do hereunto set their hands and seals, this 7th July, 1849.

THOMAS MOORE,
SCHNETZ & HEWITT.”

The bill alleged, that the complainants performed all the work stipulated in their said contract, “and delivered the same to the said Moore, who acknowledged their debt,

paid a part of it, and gave them drafts varying from the original contract ; " that this change in the drafts was not intended to affect their lien under said contract ; that on the 1st December, 1849, Moore took out of the custom-house at Louisville an enrollment of the steamboat, according to the requisitions of the acts of congress, " and, on the 8th December, again acknowledged and recognized complainants' lien on said boat, for the amount of the demands then due them, by a written memorandum endorsed on said enrollment, and also admitted the correctness of their demands existing at that time ; " which memorandum was made an exhibit to the bill, and was as follows :

" Custom-House, Louisville, Dec. 8th, 1849.

" By direction of Thomas Moore, master of the steamboat *J. Morrisette*, Messrs. Schnetz & Hewitt hold a lien on said boat, to secure the payment of six drafts, drawn by them, and accepted by said Thomas Moore, in all amounting to the sum of \$4,342 57—one draft dated November, 1849, payable in five months, for \$700 ; draft dated November 28, 1849, payable in six months, for \$800 ; draft dated December 30, 1849, payable in eight months, for \$649 26. And this endorsement is to be continued on all enrollments issued for the boat, until all the above drafts are fully paid, and Schnetz & Hewitt are fully satisfied.

R. C. THOMPSON,

Surveyor and Inspector."

The bill further alleged, that Moore still owed the complainants all the debts enumerated in this memorandum, and was liable for their payment, " in connection with the aforesaid lien ; " that the said steamboat had been employed during the year on the Alabama river, and, while lying at the wharf in Montgomery, in May, 1850, had been seized by the sheriff under several attachments and libels, all returnable to the circuit court of Montgomery ; that all of these attaching and libeling creditors were citizens of Louisiana, except French & Co., who resided in Indiana ; and that all of their claims were inferior and subordinate to the complainants' lien.

The bill was afterwards amended, by the addition of

the following averments: That by the law of Kentucky, where the contract between complainants and said Moore was entered into, and where all the work was performed, "the said agreement gave them a lien on said steamboat for the payment of the money that might become due to them on account of the performance of said work and the furnishing of said materials;" that the statutes of Kentucky did not require that this agreement should be recorded, in order to give it validity as between the parties themselves, or against subsequent creditors and purchasers from Moore; that by the laws of Kentucky, "upon the performance of said work and the furnishing of said materials under said agreement, complainants acquired and obtained a lien on said steamboat for the amount due to them on account of said work and materials," and said boat became charged with the payment of their debt; that by the written memorandum above mentioned, which was endorsed on the enrollment of the boat, "said Moore acknowledged, admitted, declared and gave a lien on the said steamboat, for the payment of the said several drafts therein specified;" that the laws of Kentucky did not require that this memorandum should be registered, but a duplicate copy of it was kept on the boat, open to the inspection of all persons dealing with her; and that the boat had not been in Alabama twelve months when the bill was filed.

A second amendment to the bill alleged, "that by the statute law of Kentucky, which was of force on the 1st July, 1849, it was enacted and provided, among other things, 'that all the officers of steamboats, except the captain, also the firemen and owners of firemen, together with the marines and other hands on all steamboats, shall have a lien for their wages on the boat, her engine, tackle and furniture, and a preference over any and all other debts due from the owners; and that steamboats, built, repaired and equipped within that State, shall be liable for all debts contracted by the master, owner, or consignee thereof, on account of work, supplies, or materials, furnished by mechanics, tradesmen, and others, for and on account of the building, repairing, furnishing, or equip-

ping such steamboats, their engine, tackle and furniture, and shall have preference over every and all other debts due from the owners, except for the wages due to the officers and crew as aforesaid; and that the lien given by said act shall not be enforced against a purchaser without actual notice, unless suit be instituted within one year from the time the cause of action accrued; but it shall be lawful for mechanics, tradesmen, and others having liens, to have notice thereof endorsed on, or attached to the enrollment of the vessel, which endorsement shall operate as actual notice of such liens.' ”

French & Co. answered the bill, admitting notice of the complainants' lien, and insisting that their own lien was of equal degree. They also filed a cross bill, alleging, as the answer also averred, that they made a contract with Moore, on the 4th July, 1849, in Indiana, for work and materials towards the building of said boat; that they performed all the work according to the stipulations of their contract, for which Moore paid them partly in cash, and gave sundry drafts or acceptances for the residue of the price; “that by the statute law of Indiana, where said work was done, they had a lien on said boat, her engines, furniture and apparel, for the payment of said work and materials;” that it was the intention of the parties that this lien should be continued, and should not be waived or lost by the giving of the bills of exchange; that on the 2d January, 1850, “in aid of said lien, and as a security for the payment of the same debt, said Moore executed and delivered to them, at New Orleans, a writing in the nature of a mortgage on said boat, a copy of which was then and there endorsed on the enrollment of said boat,” and in which the debts were alleged to be incorrectly described; which instrument was made an exhibit to the answer and cross bill, and was in the following words:

“Be it known, that I, Thomas Moore, master and owner of seven-eighths of steamboat called *J. Morrisette*, do hereby acknowledge to be indebted unto Messrs. Henry French & Co., of Jeffersonville, Indiana, the just sum of \$5,348 50, payable in my three acceptances on

J. T. Donald & Co., of New Orleans, and accepted by them, payable to the order of Henry French ; said drafts dated December 1, 1849, and payable as follows—one acceptance, payable at ninety days from date, for the sum of \$660 ; one acceptance, payable five months from date, for \$2,562 50 ; and one payable twelve months from date, for \$2,120 ; making together the aforesaid sum of \$5,348 50—the above obligations being given for materials and workmanship on the boat-building ; the mortgage or lien to continue on the boat-papers, as security for these acceptances, until finally paid and released by French & Co. This done and passed in the city of New Orleans, the 2d January, 1850. THOMAS MOORE.”

The other defendants answered, denying notice of the complainants’ lien, insisting on the superior liens of their several attachments, pleading the registration statutes of Kentucky, and demurring to the bill for want of equity.

On final hearing, on pleadings and proof, the chancellor held, that the complainants were entitled to be first paid, out of the proceeds of the sale of the boat, for their entire debt ; that the claim of French & Co. was next entitled to precedence ; and that the residue of the funds should be applied to the satisfaction, *pro tanto*, of the debts of the attaching creditors.

From this decree the attaching creditors appeal, and here assign the same as error.

J. A. ELMORE, and T. H. WATTS, for appellants : 1. When parties use a term in a contract, which has a definite, technical, legal meaning, it must be considered to have been used in its technical sense, unless it clearly appears to have been used in a different sense.—*Mechanics’ Bank v. Cook*, 4 Pick. 405 ; *State v. Smith*, 5 Humph. 349 ; *McFarland v. Wheeler*, 26 Wendell, 467 ; *Sawyer v. Fisher*, 32 Maine, 28.

2. A lien is neither *jus ad rem*, nor *jus in re*, but a mere right to hold property belonging to another until some demand against him is satisfied.—*Bouvier’s Law Dictionary*, tit. *Lien* ; *Peck v. Jenness*, 7 Howard, 620 ; 1 Story’s *Equity*, § 506 ; *Willard’s Equity*, § 123 ; *Cole-*

man v. Shelton, 2 McCord's Ch. 426; McFarland v. Wheeler, 26 Wend. 467; Gilman v. Brown, 1 Mason, 192.

3. Parties may acquire a lien on goods by contract, when they had none at common law; or they may acquire a lien by contract in cases where the common law gave it, with modifications of the common-law right; but, in all such cases, if they part with the possession, the same consequences follow as at common law, so far as the rights of third persons are concerned.—2 McCord's Ch. 126; 26 Wendell, 467; 32 Maine, 28; 1 Barbour's Ch. Rep. 480.

4. An equitable mortgage may be created in two ways: 1st, by any writing which shows the intention to create it; and, 2d, by a simple deposit of title-deeds. There must, however, be a delivery of the writing, or an actual delivery of the title-deeds; and a mere agreement to deliver, without actual delivery of the deeds, is not sufficient.—Miller on Equitable Mortgages, 218–20.

5. The liens of attachments have the same force and effect as the levy of executions, and will prevail over an unregistered deed of conveyance, and, consequently, over an equitable mortgage without notice.—Hervey v. Champion, 11 Humph. 569; Tyrell's Heirs v. Rountree, 1 McLean, 95; S. C., 7 Peters, 464; Redus v. Wofford, 4 Sm. & Mar. 579; Baldwin v. Leftwich, 12 Ala. R. 838; Cary v. Gregg, 3 Stewart, 433.

6. The contract between Schnetz & Hewitt and Moore, of July, 1849, did not create, and was not intended to create, a legal or equitable mortgage; and the parties themselves nowhere so term it, but always call it, what the law says it is, a lien or charge on the boat. It was intended only as a recognition of the statutory lien. 26 Wendell, 467.

7. If this contract did not create an equitable mortgage, the attaching creditors, having levied without notice of it, and having reduced their debts to judgment, have acquired a specific lien on the boat, which gives them a superior legal right; and the court will not deprive them of this right, since their equities are equal to

that of the complainants.—Cases cited to 5th paragraph *supra*.

8. The allegation of the amended bill, that Moore, by the endorsement on the enrollment, “acknowledged, admitted, declared and gave a lien,” is inconsistent with itself, since the endorsement could not create a lien, and at the same time evidence the declaration or acknowledgment of a pre-existing lien. The endorsement was only intended to give notice of the pre-existing statutory lien, and it can have no other effect, either at law, or in equity.

9. The same principles and authorities are applicable to the claim of French & Co., and show that it cannot prevail over the liens of the attaching creditors.

GOLDTHWAITE & SEMPLE, *contra*.—1. The original contract between Moore and Schnetz & Hewitt was intended by the parties to create a special lien on the boat for the payment of the bills of exchange; and the circumstances under which it was made—the nature of the subject-matter of the contract, the payments which it was intended to secure, &c.—show that the parties did not contemplate that Schnetz & Hewitt should retain the possession of the boat. The validity of such a contract, as between the parties themselves, cannot be questioned. It is clear, both upon principle and authority, that whenever the acts of the parties show that it was their object and intention to charge specific property with the payment of a debt, a court of equity will enforce the agreement according to their intention; and it is entirely immaterial, whether there is a conveyance of the property, or only an agreement to convey: it is enforced as a trust. *Fletcher v. Morey*, 2 Story, 555. In equity, a mortgage is simply a charge upon property, for the security of a debt; and whenever such is the contract of the parties, equity will enforce it.—*Fletcher v. Morey*, *supra*; *Davis v. Clay*, 2 Miss. 161; *Abbott v. Godfrey*, 1 Mann. (Mich.) 178; *Baldwin v. Jenkins*, 23 Miss. 206; *Dunning v. Stearns*, 9 Barbour, 630.

2. The evidence shows that it was verbally understood between the parties, when it was found that the work

done by Schnetz & Hewitt on the boat exceeded the amount contemplated by the original contract, that the lien on the boat should cover the entire amount; and the endorsement on the enrollment of the boat, by Moore's directions, was intended as a recognition and acknowledgment by him of their right to look to the boat as a security for the payment of the drafts. This endorsement could not have been intended merely as a recognition of the lien of the Kentucky statute, or to give notice of the existence of that lien. The boat was intended to run between New Orleans and Montgomery; and it was specially stipulated that the endorsement should be continued on the boat's papers, no matter where she might be, until the drafts were fully paid. The endorsement, in connection with the circumstances under which it was made, amounts to a clear and explicit declaration of a trust, which a court of equity will enforce.—*Exton v. Scott*, 6 Simon, 31; *Doe v. Knight*, 5 B. & C. (12 E. C. L.) 351; *Mobile and Cedar-Point R. R. Co. v. Tallman*, 15 Ala. 472.

3. The lien created by these contracts will be enforced against the attachments of foreign creditors, whose levies were subsequently made; and this upon the principle, that attaching, execution, or judgment creditors, take only the actual interest which the debtor has in the subject of the levy.—*Whitworth v. Gaugain*, 3 Hare, 416; *Kirsted v. Avery*, 4 Paige, 10; *In re Howe*, 1 Paige, 125; *Fletcher v. Morey*, 2 Story, 555; 17 Howard, 584; 3 Vesey, 573; *Burgh v. Burgh*, Cases temp. Finch, 58; 3 Dess. 74. Foreign contracts, by a well-settled principle of international law, receive their full effect here, unless they are contrary to the laws or policy of this State.—*Story's Conflict of Laws*, §§ 324, 325, 325 *b*; *Potter v. Brown*, 5 East, 124; *Kent's Com.* (8th ed.) 579–80; *Ohio Ins. Co. v. Edmondson*, 5 La. 295.

4. Our registration laws do not apply to vessels trading, as this boat did, between Montgomery and New Orleans. Transfers and mortgages of such vessels are to be looked for in the ship's papers, and their registration according to the acts of congress.—*Fontaine & Dent v. Beers &*

Smith, 19 Ala. 722. If our laws are held applicable, the case comes within the express exception of the statute relative to mortgaged property brought here by persons removing from another State.—Clay's Digest, 255, § 4.

5. The lien given by the Kentucky statute, which is set up in the first amended bill, must prevail over the claims of the foreign attaching creditors.—Story's Conflict of Laws, §§ 402, 402 *a*; Potter v. Brown, 5 East, 124; 5 La. 295; 8 Martin's (La.) R. 95; Carroll v. Waters, 9 *ib.* 500; 3 Hare, 416; 4 Paige, 10; 1 Paige, 125; 2 Story, 555; 3 Vesey, 573; 3 Dess. 74; 17 Howard, 584.

6. There is no inconsistency between the liens asserted in the original and amended bills, under the contract, and under the statute law of Kentucky. Both may exist, at one and the same time, in favor of the same person; and if either is sustained, he is entitled to relief.

7. In relation to the claim of French & Co.: The statute of Indiana gave them a lien on the boat, to secure the amount due them for work done; which lien, under the authorities above cited, (paragraph 5,) they are here entitled to enforce. In addition to this statutory lien, after the completion of the work, Moore executed to them, at New Orleans, the instrument set up in their cross bill, which was endorsed on the enrollment, and registered in the proper office; and by which, it is alleged and proved, he intended to declare and acknowledge a lien on the boat for the payment of this debt. This instrument, construed in connection with the circumstances under which it was executed, as disclosed by the pleadings and proof, creates a valid trust in favor of French & Co., which a court of equity will enforce.—Fletcher v. Morey, 2 Story, 555; and other authorities cited to third paragraph *supra*.

WALKER, J.—The complainants in the original bill, Schnetz & Hewitt, and Thomas Moore, one of the respondents, at Louisville in the State of Kentucky, made a written contract under seal, whereby the former agreed to make an engine, and put it on board of a certain boat; and the latter agreed to pay therefor \$3,400 during the progress of the work, and, besides, to give three "notes or

acceptances" for equal amounts, making together the sum of \$3,400. The writing concludes with a stipulation, that for the better security of the payment "of the said notes," Schnetz & Hewitt were to retain a special lien on said boat and engine until "the notes" were paid. Moore paid \$3,400 during the progress of the work, and accepted six bills of exchange, for amounts together exceeding \$3,400. The boat having been brought to Montgomery in this State, was attached and libeled by creditors of Moore & Jackman, the owners of the boat. The bill asserts for the complainants a prior lien upon the boat, and is designed to enforce that lien.

1. An attempt is made to sustain the complainants' claim to a prior lien under a statute of the State of Kentucky, where the contract was made, and the indebtedness to complainants was incurred. By that statute, steamboats, built, repaired and equipped in the State, are made *liable* for all debts contracted by the master, owner, or consignee thereof, on account of work, supplies, or materials, furnished towards the building, repairing, fitting, furnishing or equipping such steamboats, their engines, &c.; and a preference over all other debts, except for the wages of the officers and crew, is given. By the same statute it is provided, that the "lien given by the act" is invalid against a purchaser without notice, unless suit be commenced within twelve months; but that a notice of the lien, endorsed upon, or attached to the enrollment of the vessel, shall operate as actual notice. The preference given by the Kentucky statute cannot operate to defeat liens acquired by virtue of attachments and libels in this State before it was set up. This priority, or lien given by the Kentucky statute, is not a matter of contract. "It is extrinsic, and is rather a matter of personal privilege," given by the *lex loci contractus*.—Harrison v. Sterry, 5 Cranch, 298, 299. The just "comity," which is recognized in the law, requires that a contract should be expounded, and its obligations ascertained, according to the law of the country where it is made. But this principle does not extend to a recognition of liens, given by the foreign law, when it would operate prejudicially to

the rights of others in the country where such lien is asserted. The liens given by the statute in one country, upon moveables, have no superiority to liens subsequently acquired in another country, to which those moveables are carried. In support of this proposition, we cite authorities which sustain it: Story's Conflict of Laws, §§ 323, 324, 325, 325 *a*, 325 *b*, 325 *c*; Lee v. Creditors, 2 Louisiana Ann. 599; Noble v. Steamboat St. Anthony, 12 Mis. 262; Harrison v. Sterry, *supra*; Goodsill v. Brig St. Louis, 16 Ohio, 178; Smith v. Union Bank, 5 Peters, 518; McMahan v. Green, 12 Ala. 71; Merrick & Fenno v. Avery, Wayne & Co., 14 Ark. 370.

A different rule may apply, in reference to maritime liens, existing by virtue of the general maritime law. There are, doubtless, reasons why such liens should have their superiority recognized, which do not apply to domestic liens. The law which gives them existence, is common to most, if not all commercial countries; and the necessities of maritime commerce seem necessarily to require a precedence for its liens.—Story's Con. of Laws, § 402. A sound public policy does not require, that liens, such as those springing up under the Kentucky statute, upon boats navigating our inland rivers, should have conceded to them a priority over other liens, which may be acquired in other States to which they may be carried. Steamboats might be covered up, if such priority was allowed, by antecedent liens, of which there was no notice; and great injustice might be done to those who trusted the boat, upon the assumption of its liability; and there would be great room for collusive arrangements, to shelter the boat, by virtue of such liens, from just debts.

2. It is contended that the complainants have no lien by virtue of their contract. It is argued, that the parties, in providing that Schnetz & Hewitt should retain a special lien, contemplated no other than the statutory lien. If this be so, the parties have done a vain and useless thing, in bringing the subject of a lien into their contract. The language employed is appropriate to create a lien, and to provide for its continuance. If the parties intended that the lien so held should exist by virtue of the statute of

Kentucky, and not of the contract, they have not said so; nor have they said that which authorizes us to infer it.

We give effect to the words of the contract, and allow a motive to the parties in the use of them, when we understand them as creating a lien; one to exist by virtue of, and to have effect determinable by, the contract. We adopt that view of the question, and thus avoid the necessity of considering what would be the rights of the parties, if there were no other lien than that given by the statute of Kentucky.

3. It is contended for appellants, that the well-ascertained technical meaning of the word *lien*, is a right to retain possession of property until a demand is satisfied; and that it must be so understood, where it occurs in the written contract above-named. It is true that common-law liens—for example, liens of carriers, inn-keepers, factors, and artificers—are mere rights to retain until the specific debt is satisfied, and cannot continue without possession. But, whatever may be the import of the word, when applied to that class of cases, or whatever may have been its original meaning, it has acquired, in our law, a much more extended signification. It is used to designate all the various charges of debts upon land or personalty, which are created by statute, or recognized in chancery and maritime law, although neither connected with, nor dependent upon possession.—Willard's Equity Jur. 123. Thus, we have the lien of a judgment; the lien of an execution; the lien of a partner; the lien of a legal or equitable mortgage; the lien of a vendor, and various other charges which are denominated liens; and in courts of equity, the term *lien* is used to denote a charge or incumbrance on a thing, where there is neither *jus in re*, nor *jus ad rem*, nor possession of the thing.—Peck v. Jenness, 7 Howard's Rep. 612, 619; The Brig Nestor, 1 Story, 73.

The term *lien*, having so comprehensive a signification, includes an equitable mortgage; and no perversion of its meaning will be involved in construing the written contract of the parties as an equitable mortgage.

[4.] The parties unquestionably had a right by contract to create a charge upon the boat, which would exist independent of the possession of the thing charged. The inquiry, unembarrassed by the technical meaning imputed to the word *lien*, is whether they have done so.

A lien merely co-existent with the possession of the boat, could not have been contemplated. The boat was not built by Schnetz & Hewitt. It does not seem to have been designed that it should ever go into their possession. The payments were to be made in four, six, and eight months. The contract provides, that the lien was to continue until the debts were paid. It would be a most unreasonable inference, that Schnetz & Hewitt were to retain the boat for eight months. That a steamboat should for eight months lie up, depreciating from natural decay, yielding no return for the heavy outlay in its construction, and probably requiring some expense to take care of it, would have been a most unreasonable exaction for Schnetz & Hewitt to make, or for Moore to grant. The loss from the delay would have been totally disproportioned to the interest upon the amount, or the value of the forbearance to collect it. These considerations prove, with satisfactory certainty, the intention to create a lien for the security of the debt, which would exist without possession by the creditor. Such a lien has every characteristic of an equitable mortgage, and may properly be so denominated. Every agreement for a lien or charge *in rem* constitutes a trust, and is accordingly governed by the general doctrine of trusts. Such a lien or charge is called an equitable mortgage, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage. Thus, an agreement that bills should be paid out of the proceeds of certain property has been held to create an equitable mortgage.—Miller on Equitable Mortgages, 3. An agreement, “pledging and hypothecating” property for the payment of certain bills, was enforced as an equitable mortgage. Fletcher v. Morey, 2 Story, 555. A contract that a party “should have and maintain a lien” on chattels was characterized as “in the nature of an equitable mortgage,”

and as such enforced.—Dunning v. Stearns, 9 Barb. Sup. Ct. Rep. 630. And an unsealed instrument of writing, pledging the real and personal estate of a railroad company for the faithful performance of a contract, was held by this court to be an equitable mortgage.—M. & C. P. R. R. Co. v. Talman, 15 Ala. 473; see, also, Whitworth v. Gaugain, 3 Hare, 415; Campbell v. Worthington, 6 Verm, 448; Bank of Kentucky v. Vance, 4 Littell, 168; Marshall v. Lewis, 4 Littell, 140; *In re* Howe, 1 Paige, 125; Abbot v. Godfrey, 1 Man. (Mich.) 178; Coster v. Bank of Georgia, 24 Ala. 37; Kelly v. Payne, 18 Ala. 371.

[5.] The authorities cited upon the brief of the counsel for appellees, show that the equitable mortgage, created by the contract of Moore with Schnetz & Hewitt, overrides the liens of the attaching and libeling creditors. See those cases; also, Willard's Eq. Jur. 443; 2 Story's Eq. Jur. 655, § 1228; Jenkins v. Bodley, 1 S. & M.'s Ch. R. 338; Dunlap v. Burnett, 5 S. & M. 702. The charge of an equitable mortgage, like other equities, is maintainable except against innocent purchasers for value without notice. Perhaps, the creditors who attach and libel the boat, may be deemed purchasers for some purposes. Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866. But, if purchasers, the consideration is the pre-existing indebtedness; and they do not fall within the rule, which protects innocent purchasers for a valuable consideration without notice.—Boyd v. Beck, 29 Ala. 703. If, by contract, the creditors had obtained a lien for the security of their pre-existing debts, they would not be entitled to protection as purchasers for value.—Boyd v. Beck, *supra*; Dickerson v. Tillinghast, 4 Paige, 214; Donaldson v. Bank of Cape Fear, 1 Dev. 103; Powell v. Jeffries, 4 Scam. (Ill.) 387; Rowan v. Adams, 1 S. & M. Ch. 45. There is nothing in the nature of the lien given to the creditors in this case, which can make their position more favorable, so far as this question is concerned, than it would have been had their lien been regularly created by contract.—Carter v. Champion, 8 Conn. 549. The attaching creditor has a right to take what belongs to his debtor. In the absence of fraud, he stands as a volunteer in the place of the debtor.

Wanzer v. Truely, 17 How. 584; Whitworth v. Gaugain, 3 Hare, 416, 25 En. Ch. R. 416.

[6.] In this State, an unrecorded mortgage is postponed to the lien of a creditor without notice; but that results from our registration statutes, which can have no influence upon this case, because the suit was instituted within twelve months after the property was first brought to this State.—Clay's Digest, 255, § 4. This point is conclusive of the inapplicability of the registration laws of Alabama to the case; and it is, therefore, unnecessary for us to consider whether any of our registration laws embrace an instrument like this, creating an equitable mortgage, or whether a mortgage on a steamboat plying between New Orleans and Montgomery is within the operation of those statutes.—See, however, Fontaine & Dent v. Beers, 19 Ala. 722; McCain v. Wood, 4 Ala. 258; Falkner v. Jones, 12 Ala. 165; Morgan v. Morgan, 3 St. 383; Bank of Kentucky v. Vance, 4 Lit., *supra*.

[7.] The Kentucky registration law, which was pleaded, makes a "deed of mortgage, or deed of trust," void against creditors and purchasers for valuable consideration without notice, unless deposited for record as therein required. This law has been held in Kentucky not to include an equitable mortgage, which merely gives a charge upon property, without conveying it.—Bank of Kentucky v. Vance, 4 Littell, 174. We follow that decision here, because we approve the reasoning of it, although it has not been pleaded or given in evidence, and is therefore not binding upon us. As the Kentucky registration statute does not include the instrument which gives to the complainant their lien, it is unnecessary for us to pass upon any other objection to the defense attempted to be based upon the foreign registration laws.

[8.] The non-conformity of the securities given to those contemplated in the contract, and the blending in the same securities of an additional amount of debt, to that for which the contract provided a lien, would not destroy the lien so provided.—Boyd v. Beck, 29 Ala. Rep. 703; Cullum v. Bank, 23 Ala. Rep. 797; Hair v. Grigsby, 18 Ala. Rep. 44.

[9.] One partner has the right to incumber the entire interest in the personal property of the partnership for the security of its debts. It would, therefore, be no objection to the extension of the complainants' lien over the entire interest in the boat, that the equitable mortgage was given by Moore alone, if a partnership existed between Moore and Jackman.—Story on Partn. § 94; Tapley v. Butterfield, 1 Metcalf, 515; Deckard's case, 5 Watts, 122; Milton v. Masher, 7 Metc. 244. But it no where appears from the original or amended bills, that Moore and Jackman were partners, either in the ownership of the boat, or in running it after it was built. The mere fact that Moore owned a certain interest in the boat, and Jackman the remaining interest, does not, of itself, constitute them partners. There may be a joint property in a steamboat, without the existence of a partnership. Unless a partnership existed, or Moore had authority from Jackman to bind his interest, the lien given by the former could cover only the interest which he had in the boat. As neither a partnership nor an authority to Moore from Jackman is shown, the operation of complainants' lien must be confined to Moore's interest in the boat.

[10.] Our argument thus far shows, as we think, that Schnetz & Hewitt have a lien, by virtue of their contract of July, 1849, which they are entitled to enforce in this suit. But the sum for which a lien is given by that contract is limited to \$3,400. The debt of the complainants is much larger, and is shown by the proof to have become so in consequence of work done in addition to that prescribed by the contract. The lien given by the contract cannot be enlarged, so as to secure this addition to the indebtedness, upon the ground that it was verbally agreed, or intended, or understood, when the additional work was done, that it should be so enlarged; or upon the ground that the additional indebtedness was contracted on the faith of the lien; for there is no averment in the original or amended bills of such facts. In the entire omission of any such averments, this case differs from Fletcher v. Morey, 2 Story, 555.

[11.] After the bills of exchange were given to secure

the debt due Schnetz & Hewitt, Moore caused an endorsement upon the enrollment of the boat by the surveyor and inspector of the port of Louisville to be made, as follows: "Messrs. Schnetz & Hewitt hold a lien on said boat, to secure the payment of six drafts," &c., "and this endorsement to be continued on all enrollments issued for the boat, until all the above drafts are fully paid, and Schnetz & Hewitt are fully satisfied." The amended bill alleges, that Moore, by that memorandum, "acknowledged, admitted, declared, and gave a lien;" and the original bill says, that he thereby "acknowledged and recognized the lien."

The majority of the court regard the declaration made by Moore to the surveyor and inspector of customs, and endorsed by his directions upon the enrollment of the vessel, upon the averments of the bill above stated, as a declaration of a trust in favor of Schnetz & Hewitt, for the entire amount of debt secured by the drafts described in the endorsement upon the enrollment, which trust, they think, is valid in equity, and being sustained by proof, must be upheld in this case. Taking all the circumstances alleged in the bill together, my opinion is, that the endorsement upon the enrollment was simply made by Moore's direction for the purpose of giving notice of the pre-existing statutory lien, and was not designed to evidence the declaration of any new trust. The authorities referred to on the brief of counsel, show that such a declaration of trust, as my brethren suppose was made, will be sustained in equity.

[12.] The complainants in the cross bill are entitled to no relief. The language endorsed upon the enrollment, in favor of the complainants in the cross bill, which touches the subject of lien, is as follows: "The above obligation being given for materials and workmanship on the boat building, the mortgage or lien to continue *on the boat papers*, as security," &c. If these words were regarded as giving a lien, it would be a lien "*on the boat papers*," which would be absurd. What is said about continuing the lien on the boat-papers, means nothing more than that the fact of the existence of the lien, given by the

statute to the boat-builder, should remain evidenced by an endorsement on the papers of the boat. Its object was merely to give notice that a lien existed, by preserving a statement of that fact upon the papers of the boat.

The decree of the court below is reversed, and the cause remanded, that a decree may be rendered consistent with the foregoing opinion. The appellant must pay the costs of this court.

COURSON *vs.* HERRIN'S ADM'R.

[MOTION TO AMEND JUDGMENT NUNC PRO TUNC.]

1. *Admissibility of parol evidence to affect record.*—On motion to amend a record *nunc pro tunc*, so as to make it show that a judgment by default was rendered on the fourth, instead of the third day of the term, the correctness of the entries on the minutes of the court, showing the meeting and adjournment of the court, and the day on which the judgment was rendered, cannot be contradicted or impeached by parol testimony, which does not show fraud.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. S. D. HALE.

In this case, the appellants, who were the plaintiffs below, made a motion at the fall term of said court, 1857, to amend the minutes of the court *nunc pro tunc*, as of the April term, 1856, so as to show that a judgment, which they had recovered against the administrator of William Herrin, deceased, was in fact rendered on the 10th April, which was the fourth day of the term, instead of the 9th April. The judgment was by default, with writ of inquiry executed, and did not specify the day on which it was rendered; but it was entered on the minutes of the third day of the term, as shown by the clerk's entry of the meeting and adjournment of the court for the day.

In support of the motion, the plaintiffs read to the court the affidavits of two attorneys and of the clerk, together with the record book of the minutes of the court. The attorneys' affidavits stated, that the judgment was rendered, to their certain knowledge, on the fourth day of the term; and that of the clerk was to the same effect. The clerk further stated, in his affidavit, that for the purpose of keeping up with the business of the court, he had filled up, before the term commenced, several pages of the minutes with blank judgment entries, as for judgments by defaults, judgments on verdict, continuances, writs of *scire facias*, &c., so that only the blank names and amounts would have to be filled up each day; that his blanks did not correspond exactly with each day's business; and that plaintiffs' judgment, in entering which he merely filled up one of the blank judgments by defaults, was accidentally entered up as of the the third, instead of the fourth day of the term. On all the evidence adduced, the court refused to allow the amendment; to which ruling the plaintiffs excepted, and which they now assign as error.

GEO. W. GUNN, for the appellants.

CLOPTON & LIGON, *contra*.

RICE, C. J.—The entries made during term time, on the minutes of the circuit court, of the adjournment of the court from one specified day to another, and of the particular day on which a judgment was rendered, are, in the absence of fraud, and of any conflicting entry on the record, or by the judge on any docket or book of the office, not assailable by parol testimony.—*Deslonde v. Darrington*, 29 Ala. 92. Nor can they be amended, *nunc pro tunc*, upon parol testimony which does not show fraud, and which is in conflict with the minute entries as to the day on which the judgment was rendered.—*Hudson v. Hudson*, 20 Ala. 364; *Shepherd's Dig.* 396, §§ 26 to 41; *Tisdale v. Gundy*, 1 Hawks, 282; *Austin v. Rodman*, *ib.* 71; *Reid v. Kelly*, 1 Dev. 313.

Judgment affirmed.

STUBBS vs. HOUSTON.

[CONTESTED PROBATE OF WILL.]

1. *Burden of proof as to testator's capacity.*—When the probate of a will is contested on the ground of the insanity or mental incapacity of the testator, it is not incumbent on the proponent, in making up the issues, to affirm that the testator was of sound mind; nor is the *onus* on him of proving sanity.
2. *Relevancy of evidence to prove undue influence or insanity.*—The fact that the testator, several months after the execution of his will, executed a deed conveying all his property to a trustee, to be managed and controlled for him, and that this was done, at the instance of his friends, for the purpose of placing him in an advantageous position to contest the validity of a contract which he had previously made, is relevant evidence for the contestants, as affecting the questions of the testator's mental capacity and susceptibility of influence from others.
3. *Same.*—Whether a will is natural, is a legitimate inquiry, when its validity is contested on the grounds of undue influence and insanity; and, as affecting that question, the pecuniary circumstances of the testator's nephews, who, in the event of his intestacy, would have been the distributees of his estate, are relevant and pertinent evidence.
4. *Same.*—The fact that the testator, after the execution of the paper propounded as his will, gave a mortgage to secure a debt not really due, or for a sum much greater than was really due, is also competent evidence for the contestants, as bearing on the question of his intellectual condition and capacity.
5. *When witness may give opinion as to testator's sanity.*—A witness who had known the testator from childhood, and been intimate with him, is competent to give his opinion as to the latter's mental *status* generally, although he seldom saw him during the two or three months which immediately preceded the execution of the will.
6. *Implied revocation of will.*—The subsequent execution by the testator of a mortgage on a part of his property, does not operate an implied revocation of his will, (Code, § 1603,) although such mortgage was procured by the sole beneficiary under the will, and was executed by the testator, under the belief that the will was invalid, and with the intention that it should revoke, and be substituted for the will.
7. *Standard of testamentary capacity.*—Although any person, possessing capacity sufficient to transact the ordinary business of life, is capable of making a valid will; yet it cannot be asserted, "that the standard of capacity, fixed by law, as requisite to the making of a will, is such as enables a man to transact the ordinary business of life:" on the contrary, a person may be competent to make a will, without possessing such capacity as would enable him to transact the ordinary business of life.
8. *Same.*—A total deprivation of reason or understanding is not requisite to destroy testamentary capacity.

9. *Opinion of witness on question of insanity.*—The fact that a witness, who had an opportunity of forming a correct judgment of the testator's sanity, is unable to state all the circumstances on which his opinion is predicated, or that the circumstances stated by him do not justify his opinion, does not authorize the court to exclude his opinion as evidence, or to instruct the jury to disregard it.

APPEAL from the Probate Court of Dallas.

IN the matter of the last will and testament of John A. Stubbs, deceased, which was propounded for probate by James B. Stubbs, who was a brother of the testator and the sole beneficiary under his will, and was contested by the appellees, who were the children of a deceased sister of the testator. The paper propounded for probate was dated the 13th August, 1855, attested by three witnesses, and was in the following words:

“State of Alabama, } In view of the uncertainty of
 Dallas County. } human life, and in consideration of
 the natural love and affection that I bear for my brother,
 James B. Stubbs, I bequeath to him all of my property,
 both real and personal, and all evidences of property of
 which I may die possessed, and all choses in action, notes
 and accounts, a negro boy named George, copper-colored,
 a son of Lenette; also, my horse and buggy, and all
 money that I may have on hand; and for my brother,
 James B. Stubbs, to have and to hold to his exclusive use,
 for him and his heirs forever, I declare it as my unequiv-
 ocal intention and will, for him to have all my property,
 of whatever kind, at my death, and that he may not be
 prevented for the want of form in this will, which I de-
 clare as my last will and testament. I will him all my
 property at my death, for him to have and to hold, for his
 use and his heirs forever. In witness whereof, I set my
 hand and seal.”

In the *caveat* filed by the contestants, they objected to the probate of the will on the grounds, “that the testator was laboring under an insane delusion when he signed the paper, and was incapable of making a will from mental imbecility,” and that it was procured by fraud and undue influence on the part of the proponent. “The application

for the probate of the will was made by the proponent orally; and the issues coming to be made up under the directions of the court, the proponent took issue on the grounds of objection set out in the *caveat*. The contestants then insisted, that the proponent should allege in writing, at this stage, that the paper propounded for probate was duly executed, and that the testator was of sound mind at the time it was executed. The court required the proponent to do this, against his objection; to which he excepted, and thereupon submitted the following allegations in writing: 'The proponent, James B. Stubbs, as the sole devisee in said will, offers for probate the last will and testament of John A. Stubbs, and avers, that the same was duly executed, and that he was of sound mind at the time said will was executed.' The contestants took issue on said allegations, 'denying the same, and denying that the paper propounded for probate is the last will and testament of said John A. Stubbs.'"

The proponent introduced two of the subscribing witnesses to the will, who testified, in substance, that the will was written by one Brantley, (one of said witnesses,) at the instance of the proponent; that it was signed by the testator, on the day of its date, in the presence of the three attesting witnesses, and was attested by them in the presence of the testator and of each other; that the testator was a man of ordinary mental capacity, but somewhat below mediocrity; that he had always attended to his own business affairs, and, when sober, was capable of transacting ordinary business; that he had been sick several weeks when the will was executed, but his illness had not impaired his mind; and that he had, in their opinion, sufficient mental capacity to make a will. It was shown that the third attesting witness had removed from the State.

On cross examination of the witness Brantley, the contestants asked him, "what was the pecuniary condition of the contestants at the date of the will?" The proponent objected to this question, but the court allowed it to be asked; and the witness answered, "that they had some property, though they were not wealthy." An

exception was reserved by the proponent to this ruling of the court.

On cross examination of said Brantley, the contestants asked him, "if he had not, at the instance of the proponent, accepted the trusteeship of certain property conveyed to him by the testator; if said deed did not convey all the property owned by the testator; if it was not made because the testator was incapable of attending to his business, and some one else had to do it for him; if said trusteeship was not created with the advice and consent of the proponent; and if the testator and the proponent had not executed to each other, in writing, releases of all obligations between them growing out of a trade made between the testator and the proponent with one Pool?" In reply to these questions, the witness stated, in substance, that in December, 1855, the testator had conveyed to him, by deed of trust, all the property which he knew the testator possessed; that he accepted the trust, and was to manage and control the property for the benefit of the testator; that this deed was executed after consultation with the testator's friends, the proponent being present when it was agreed on, "and was made for the purpose (more than for anything else) of placing the said testator in an advantageous position to contest the validity of his said contract with Pool;" that said contract with Pool was a contract by which the testator sold certain lands and negroes to him and the proponent, and "in which it was thought said Pool had swindled him;" that the testator, at the time this deed was executed, executed a release to the proponent from all liability on the notes given to him and Pool, and the proponent executed to him a quit-claim deed for the land and negroes embraced in the contract; and that all this was done for the purpose of assisting the testator to obtain a rescission of the contract with Pool. "The proponent moved the court to exclude what the witness stated in regard to the trusteeship, the trust deed, and the other deeds; but the court overruled his motion, and said, that he would instruct the jury upon the effect of the evidence when all the evidence in the case was introduced; to which refusal of the court

the proponent excepted." The deeds referred to were read in evidence, against the proponent's objection, and he excepted to their admission.

It appeared that the testator recovered from the attack of sickness under which he was laboring at the time the will was executed, and did not die until February, 1857; that at the time said will was executed, the proponent executed a similar will in his favor; that these wills were executed under an agreement between the two brothers, to the effect that the one who died first should bequeath all his property to the other; and that the testator, in a conversation had with Brantley after his recovery, expressed his satisfaction with the will, and requested Brantley to preserve it. The contestants read in evidence, after proof of its execution, a mortgage executed by the testator on all his slaves, dated January 31, 1857, and purporting to have been given to secure the payment of two promissory notes, due from the testator to the proponent, dated January 31, 1857, payable one day after date, and together amounting to over \$10,000. The proponent objected to the admissibility of this mortgage as evidence, and reserved an exception to the ruling of the court in admitting it. He also adduced evidence tending to show, that the testator's motive in executing this mortgage was, to screen his property from a judgment, which he feared might be recovered against him, in an action of trespass for an illegal arrest, instituted against him and others by one Summerlin.

The contestants introduced several witnesses, physicians, and acquaintances of the testator, who testified to his general weakness of mind, incapacity for business, and habitual intoxication. "One W. B. Andrews, examined by the contestants, testified, that he had known the testator from childhood, and was raised in the same neighborhood with him; that he was a boy of very ordinary mind, and, after he grew up, became much addicted to drink; that he removed to Clarke county in 1850 or 1851, and returned to Dallas in 1855; that witness frequently saw him, during the intermediate time, when he came up to Dallas on visits; that after he came back to

Dallas, he staid at W. B. Hall's, near where witness resided; that witness, being then a candidate for sheriff, and out electioneering in the county, did not see him often; that he was generally drunk, or under the influence of liquor, when witness saw him; that witness had known him always, and had an intimate acquaintance with him; and that, from his knowledge of him, he did not think him of sound mind, or competent to make a will. The proponent objected to this witness giving his opinion of the testator's sanity or insanity; but the court allowed the witness to express his opinion, and the proponent excepted."

All the evidence adduced on the trial is set out in the bill of exceptions, but a further statement of it is not material to the points considered and decided by this court.

"The court thereupon instructed the jury as follows:

"1. That he would permit them to look to the mortgage read in evidence, to determine whether there was a revocation of the will or not; and that he would allow the mortgage and other instruments read in evidence, each separately, or all together, to the jury, for the purpose of showing whether the testator, at the time of making the will, was of sound mind or not, or whether the will was procured to be made by fraud or undue influence, or whether there was a revocation of it or not.

"2. That the standard of capacity, fixed by the law, as requisite to the making of a will, was such as enabled a man to transact the ordinary business of life."

The proponent excepted to each of these charges, and then requested the court to give twenty-eight written charges; all which the court gave as asked, except the following:

"23. That the unsoundness of mind, which justifies the setting aside of a will, must not be mere weakness, or imbecility, but must be a total deprivation of reason." This charge the court qualified, by adding, "that the testator, to make a will, must have capacity enough to know how to attend to the ordinary business of life;" to which

qualification, as well as to the refusal of the charge as asked, the proponent excepted.

"24. That a person of imbecile mind, in the sense of the law, as respects legal capacity or incapacity, is distinguishable from one who is a lunatic, a fool, or an idiot; and as weak minds differ from strong ones only in the extent and power of their faculties, unless they betray a total loss of understanding, or idiocy, or delusion, they cannot be properly considered of unsound mind." This charge the court qualified, by adding, "that it did not require a total loss of understanding to render one properly of unsound mind;" to which qualification, as well as to the refusal of the charge as asked, the proponent excepted.

"25. That although the testator's understanding may have been obscured, and his memory troubled, from habitual intoxication; yet, to render his will void in law, he must, at the time of the execution, either have labored under general insanity, or been so excessively drunk as to be utterly deprived of his reason and understanding." This charge the court qualified, by striking out the word "*utterly*;" to which qualification, as well as to the refusal of the charge as asked, the proponent excepted.

"26. That in making up their verdict, the jury should not regard as evidence the opinions of witnesses, except physicians and the subscribing witnesses, unless the facts are stated upon which those opinions are founded; and even when the facts are stated, no weight should be given to the opinions of the witnesses, unless, in their judgment, the facts stated authorized those opinions." This charge the court gave, but with this qualification, "that if the witnesses had an intimate acquaintance with the testator, and had seen him transact business, then their opinions should be received;" to which qualification, as well as to the refusal of the charge as asked, the proponent excepted.

"27. That neither the mortgage, nor the other instruments read in evidence, could be looked to by the jury, as furnishing any evidence of the revocation of the will pre-

viously executed;" which charge the court refused to give, and the proponent excepted.

The court charged the jury, at the request of the contestants, among other things, as follows:

"1. That the burden of proof is on the party propounding the will, to show that the testator, at the time of its execution, was of sound mind; that when such proof is made, it then devolves on the contestants to show that the will was made by fraud or undue influence; yet, if the will was unnatural, and was made by a person of imbecile mind, and who was greatly depressed, both in mind and body, by sickness and *mania a potu*, the inference naturally arises that it was procured by circumvention, or undue influence; and, in such a state of case, it devolves on the proponent to show that such fraud or influence was not exerted when the will was made, especially where the will was made at the instance and suggestion of the sole legatee under it."

"4. If the proponent is the sole legatee under the will, and procured the testator to execute to him a mortgage on all his property, to secure a debt that was not due; and if he procured the mortgage because he believed said will to be invalid; and if the testator executed the mortgage for the same reason, intending it to revoke and be substituted for the will,—that this would be a revocation of the will, if the mortgage was executed after the date of the will."

To these charges the proponent excepted.

The appeal is prosecuted by the proponent, who assigns as error all the rulings of the court to which he reserved exceptions.

ALEX. WHITE, J. R. JOHN, and JONA. HARALSON, for the appellant.

JOHN T. MORGAN, *contra*.

A. J. WALKER, C. J.—Upon the question of the *onus* of proof as to testamentary capacity, the authorities are conflicting: many of them holding, that it is for the proponent of a will to prove the sanity of the testator,

(Dunlap v. Robinson, 28 Ala. 100; Wallis v. Hodgson, 2 Atk. 55; Powell on Devises, 82; Gerrish v. Nason, 22 Maine, 438; Potts v. House, 6 Geo. 324; Harris v. Ingledew, 3 P. Wms. 93; Brooks v. Barrett, 7 Pick. 94; Comstock v. Hadlyme, 8 Conn. 26;) while many others hold, that the presumption of sanity applies as well to probate as other cases.—Saxon v. Whitaker, 30 Ala. 237; Pettes v. Bingham, 10 N. H. 514; Jackson v. Van Dusen, 5 Johns. 144; Rogers' Ecclesiastical Law, 900; Groom & Evans v. Thomas & Thomas, 2 Hagg. 433; Burrows v. Burrows, 1 Hagg. 109; 1 Jar. on Wills, 74, and note; 2 Greenleaf on Ev. 689; Sloan v. Maxwell, 2 Green's Ch. 580; 1 Williams on Ex. 18; Lessee of Hoge v. Fisher, 1 Pet. C. C. R. 163.

The *prima-facie* intendment in favor of testamentary capacity, when an issue for the contestation of a will is made up, is consistent with the presumption, generally made, that men are sane; and is required by the principle enunciated in the recent decision of this court in Saxon v. Whitaker, *supra*; and is the only rule which can harmonize with the law allowing the admission of a will to probate upon proof of handwriting, when the attesting witnesses are dead, insane, or out of the State, or have become incompetent since the attestation. We decide, therefore, that it was not incumbent upon the proponent to affirm the testator's sanity in making up the issue; and that there was error in the instruction to the jury, that the *onus* of proof as to the question of sanity was upon the proponent.

[2.] The testimony as to the execution of the trust deed to Brantley, with the attending circumstances, and the fact of the testator's seeking a rescission of his contract of sale, and employing the agency of a trustee to procure it, (whether remote or immediate, it is not for us to decide,) had a bearing upon the question of the testator's capacity and susceptibility of influence from others. That testimony, and the reciprocal instruments executed by the testator and his brother at the time, were, therefore, admissible.

[3.] A legitimate inquiry in the contest of a will upon

the ground of undue influence and insanity, is whether the will is natural. To that inquiry, the pecuniary condition of the testator's nephews, who would have been distributees of his estate in case of intestacy, was pertinent; and the evidence upon that subject was admissible. *Roberts v. Trawick*, 13 Ala. 68; *Coleman v. Robertson*, 17 Ala. 84; *Gilbert v. Gilbert*, 22 Ala. 529; *Couch v. Couch*, 7 Ala. 519.

[4.] The fact of the testator's giving a mortgage after the execution of the will, to secure a debt really not due, or for a sum much larger than was really due, was pertinent to the question of his intellectual condition; and the evidence tending to show those things was properly received. Whether the evidence required explanation, or was sufficiently explained, it is not our province to decide. *McAllister v. State*, 17 Ala. 434; *McLean v. The State*, 16 Ala. 672; *Walker v. Clay*, 21 Ala. 797.

[5.] Under the decisions in this State, the testimony shows the existence of such an opportunity on the part of the witness, Andrews, to know and form a correct judgment upon the mental *status* of the testator, that it was competent for him to give his opinion in connection with the facts deposed to by him. Whether the facts stated were, as is contended, insufficient to justify his conclusion, was a question for the jury.—*Powell v. The State*, 25 Ala. 21; *Florey v. Florey*, 24 Ala. 241; *Norris v. The State*, 16 *ib.* 776; *Roberts v. Trawick*, 13 *ib.* 84; *Bowling v. Bowling*, 8 *ib.* 538; *State v. Brinyea*, 5 *ib.* 241; 1 *Jar. on Wills*, 75, note 2; but see, also, *McCurry v. Hooper*, 12 Ala. 823, which seems to contain expressions inconsistent with the other cases. The exception to the testimony of Andrews applies *alone* to his opinion upon the question of *sanity*, and we merely decide that the *exception* is not well taken.

[6.] The mortgage, executed by the testator after making his will, does not manifest any intention on the part of the mortgagor to revoke the pre-existing will, nor is any such intention deducible from the will itself. Section 1603 of the Code says, "that a charge or incumbrance upon any real or personal property, to secure any

money, or the performance of any contract, does not operate as a revocation of any devise or bequest of such estate previously executed, unless it appears from the will, or instrument creating such charge or incumbrance, that such was the intention of the testator." If the entire subject-matter of the bequests is covered by the mortgage, this statute presents an insuperable barrier to the conclusion, that the bequests are revoked by the subsequent mortgage. But at common law, the mortgage would not, of itself, operate an entire revocation of the will. The reasons why it would not are obvious, and are set forth in 1 Jarman on Wills, 171, marg. 131. But furthermore, the testator, as it was competent for him to do, bequeathed, in general terms, all his property at his death to his brother, the proponent.—Code, § 1502. The mortgage could not, of itself, effect a revocation of such a bequest; nor could any subsequent conveyance of a part of the property, or change in its character, effect such revocation. Any interest, or right of redemption, or other right remaining in the testator at his death, would fall within the operation of the bequest. The deed of trust to Brantley, and the rescission by the testator of his contract of sale, would not revoke the will.

But one of the charges assumes the position, that although the mortgage may not, *per se*, revoke the will; yet it did have that effect, if it was made to the sole beneficiary under the will, and such beneficiary procured it because he believed the will to be invalid, and the testator executed the mortgage for the same reason, intending that it should revoke and be substituted for the will. This charge does not present any of the cases of revocation mentioned in article 1, chap. 2, title 4, part 3 of the Code. Excepting the cases provided for in that article, section 1613 of the Code prohibits the revocation of a will, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator himself, or some person in his presence, or by his direction, or by some other will in writing, or some other writing of the testator, subscribed and attested according to the requisitions of the section prescribing the mode of

execution and attestation of wills. The facts presented in the charge under consideration, certainly do not describe any one of the modes to which the power of revocation is limited by our statutes, and the court erred in treating them as evidencing a revocation of the will.

[7.] One of the charges given asserted, that "the standard of capacity fixed by the law, as requisite to the making of a will, was such as enabled a man to transact the ordinary business of life." It is probable, that this charge was induced by a misapprehension of a remark by this court in the case of *Coleman v. Robertson*, 17 Ala. 84-87. The remark is as follows: "We do not apprehend, that any one will doubt, that any person is capable of making a will, who possesses sufficient capacity to transact the ordinary business of life." This was said in reference to a charge objected to by the contestant of a will. The object was not to define a test of testamentary capacity, but simply to show that a capacity to transact the ordinary business of life was not below the standard of testamentary capacity, and that therefore the contestant had no right to complain. The assertion that a man is competent to make a will, who has capacity to transact the ordinary business of life, is a very different thing from making the capacity to transact the ordinary business of life the test or standard of testamentary capacity. It might with truth be said, that a lawyer, capable of conducting and arguing with professional skill a complicated case, involving difficult and abstruse questions, had a testamentary capacity; yet it would not follow, that a competency for such a task was the standard by which to decide the question of competency to make a will. There is, therefore, in the case referred to, no authority for the charge.

In *Taylor v. Kelly*, 31 Ala. 59, we said, if the testatrix "had memory and mind enough to recollect the property she was about to bequeath, and the persons to whom she wished to will it, and the manner in which she wished it to be disposed of, and to know and understand the business she was engaged in, she had, in contemplation of

law, a sound mind; and her great age, bodily infirmity, and impaired mind, would not vitiate a will made by one possessing such capacity."—1 Jar. on Wills, 50, 51, 52, 53, and notes; 1 Wms. on Ex. 35, and notes; Stevens v. Van Cleve, 4 Wash. C. C. R. 262; Rawdon v. Rawdon, 28 Ala. 565; Coleman v. Robertson, 17 Ala. 84; McElroy v. McElroy, 5 Ala. 81.

There may be a competency to make a will, without such capacity as would enable a man to transact the ordinary business of life. Feebleness of intellect, or the childishness and fretfulness of old age, not amounting to mental unsoundness, might make one unfit for the active business transactions of life, which would require prompt action upon newly presented subjects, with combinations to which the mind was unaccustomed; and yet there might be a full capacity to make a will. The rule which would make a capacity for the management and transaction of business generally the standard of testamentary capacity, is repudiated in Kinne v. Kinne, 9 Conn. 102, and Harrison v. Rowan, 3 Wash. C. C. R. 586.

Our argument does not interfere with the decision in McElroy v. McElroy, 5 Ala. 81, which seems to analogize the capacity to make a will with that which is necessary to make a contract; for it is conceivable, that one might have a sound mind, and be competent to make a contract, and yet be unfitted for engagement in the active duties of the business world. Certainly, an incapacity to transact the ordinary business of life would afford ground for an argument to the jury, but it cannot, consistently with reason or law, be made the standard of testamentary competency.

[8.] A total deprivation of reason is not requisite to destroy testamentary capacity. *Dementia*, and idiocy, are not the only forms of incapacity. A competent testator must not only have mind and memory, but mind and memory enough to understand the business in which he is engaged. There was, therefore, no error in the first three refusals to charge.

[9.] One of the reasons why one occupying a relation of peculiar intimacy with a person whose sanity is dis-

puted, is permitted to express an opinion, is that it may be impossible for him to state all the minute circumstances, and to precisely describe the conduct and appearance, which are, in part, the predicate of his opinion. It may be, therefore, that an opinion as to intellectual soundness is correct, notwithstanding the witness might not be able to state facts from which his conclusion would be a necessary sequence. It does not necessarily follow, therefore, that the opinion of a witness should be excluded, because he is unable to state everything upon which it is based; or that it should be totally disregarded, because the facts actually stated may not justify the conclusion. There was no error in the fourth refusal to charge as requested by the proponent.

We think the points decided will cover the points likely to arise upon another trial, and we therefore decline to pass upon the other questions presented.

The judgment of the court below is reversed, and the cause remanded.

WEEKS *vs.* NAPIER.

[GARNISHMENT ON JUDGMENT.]

1. *Waiver of security for costs.*—If a garnishee answers, joins in the issue contesting his answer, and reserves exceptions to the rulings of the court on the trial of the issue, he cannot move to dismiss the proceeding, at a subsequent term, for want of security for costs on the part of the plaintiff, who was a non-resident.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. C. W. RAPIER.

THE appellant in this case, having obtained a judgment against one Ellis, summoned the appellee, by process of garnishment, as the debtor of Ellis. The garnishee ap-

peared, and filed an answer, which, at the fall term, 1856, was stricken from the files on motion of the plaintiff; and a judgment *nisi* by default was then rendered against him. At the ensuing term, the judgment *nisi* was set aside, on the motion of the garnishee, and he was examined orally in open court as to his indebtedness to Ellis. The plaintiff contested the correctness of this answer, and tendered an issue on several specifications of its incorrectness. The garnishee objected to the sufficiency of these specifications, and excepted to the overruling of his objections; and he reserved several other exceptions to the rulings of the court in the formation of the issue joined on his answer. At the fall term, 1857, on motion of the garnishee, the court dismissed the garnishment proceeding, because it appeared that the plaintiff, who was admitted to be a non-resident, had not given security for the costs when the garnishment was sued out; to which the plaintiff excepted, and which he now assigns as error.

LOMAX & PRINCE, for the appellant.

I. W. GARROTT, *contra*.

STONE, J.—The right of a defendant to dismiss, for want of security for costs, is a right which he, so far as he is concerned, may waive. He will not be permitted to deal with the case as one rightly in court; continue, or contribute to the continuation of the litigation; and, after heavy costs have been incurred, or, perhaps, after he makes the discovery that his defense will be unavailing, then for the first time raise the objection, that he had been improperly sued, without security for costs; and for this omission have the cause repudiated. Such practice would work the grossest injustice.

In the present case, the garnishee submitted to the jurisdiction of the court, by answering; excepted to the action of the court in several particulars; made up an issue on the truth of his answer; and, at a subsequent term, moved to dismiss, because the plaintiff was a non-resident, and had not given security for costs. The mo-

tion should have been overruled.—See *Thompson v. Lea*, 28 Ala. 453; *Ex parte Robbins*, 29 Ala. 71.

Judgment of the circuit court reversed, and cause remanded.

CURTIS vs. WILLIAMS.

[APPLICATION FOR REVOCATION AND GRANT OF ADMINISTRATION.]

1. *To whom and when letters of administration must be granted.*—Under the provisions of the Code, (§§ 1668–69, 1675, 1682,) letters of administration cannot be granted to the largest creditor of the decedent, until the expiration of forty days after the death of the decedent is known, unless all the persons having a prior right to the administration have relinquished their right in the manner prescribed in the statute; nor can letters be properly granted, before the expiration of such forty days, to a person who is neither the widow, (or husband, as the case may be,) next of kin, or largest creditor of the decedent, unless all of them have relinquished their right.
2. *Revocation of letters improvidently granted.*—If letters of administration have been improvidently granted to a person who was not entitled to them, it is the right and duty of the court, on the application of any person whose right is thereby prejudiced, to revoke them, on the ground that they were improvidently granted.
3. *When application for grant of letters must be made.*—The largest creditor of the estate, desiring the revocation of letters prematurely granted to another, and the grant of letters to himself, must make his application within forty days after the death of the intestate is known, although the persons previously entitled to administer may not then have relinquished their right. (STONE, J., *dissenting*, held, that such creditor could not complain of the dismissal of his application, which was filed before the expiration of the forty days, when he did not show that the persons having a prior right had relinquished it.)
4. *Right of administration cannot be delegated.*—The widow, or other person entitled to the administration, cannot delegate that right to another, to the exclusion of the person on whom the statute next casts the right.

APPEAL from the Probate Court of Lowndes.

IN the matter of the estate of Joel Burt, deceased, on the application of Thomas D. Curtis, the appellant, for the revocation of letters of administration previously

granted to Thomas M. Williams, and the grant of letters to himself. The petition was filed on the 6th January, 1859, and alleged the following facts: That the decedent, Joel Burt, died in Lowndes county, intestate, on the 28th November, 1858, having assets in said county at the time of his death; that he left a widow, Mrs. Jane Burt, who resided with her husband at the time of his death, and still continued to reside in said county; that Mrs. Burt, on the 7th December, 1858, relinquished her right to administer on the estate of her said husband, in favor of Thomas M. Williams, the general administrator of the county, and filed her written relinquishment in said probate court; that said Williams, on the 13th December, 1858, made application for the grant of administration on said estate, and letters were accordingly granted to him as the general administrator of the county; that the decedent, at the time of his death, was indebted to the petitioner in the sum of \$5,300, which amount was still due when the petition was filed; that the petitioner was the largest creditor of the decedent's estate, was of lawful age, was competent to administer on said estate, and was entitled to the administration in preference to any other person; and that he therefore prayed the revocation of Williams' letters, and the grant of letters to himself.

The court sustained a demurrer to the petition, on the ground that it showed a valid grant of administration to Williams, and did not allege any sufficient cause for the revocation of his letters; to which the petitioner excepted, and which he now assigns as error.

BAINÉ & NESMITH, for appellant.

THOS. WILLIAMS, *contra*.

R. W. WALKER, J.—Sections 1668 and 1669 of the Code are in the following words:

“§ 1668. Administration of an intestate's estate must be granted to some one of the persons herein named, if willing to accept and fit to serve, in the following order:

“1. The husband, or widow.

“2. The next of kin entitled to share in the distribution of the estate.

“3. The largest creditor of the intestate, residing within the State.

“4. Such other persons as the judge of probate may appoint.

“§ 1669. If no person entitled to the administration of the estate, according to the three first subdivisions of the preceding section, applies for letters, within forty days after the death of the intestate is known, such persons must be held to have relinquished their right to the administration.”

By section 1675 it is provided, that “no letters of administration must be granted, till the expiration of fifteen days after the death of the intestate is known.”

By section 1682 it is provided, that “the administration of an estate must not be committed to the general administrator, or to the sheriff or coroner, except as special administrator, until the death of the decedent has been known sixty days.”

Considering these various sections in connection, the following rules may be announced as resulting from their provisions :

No person should be appointed administrator, until the expiration of fifteen days after the death of the intestate is known. If there be a husband or widow, no other person should be appointed until the expiration of forty days after the death of the intestate is known, unless the husband or widow, prior to that time, relinquish the right in the mode prescribed by section 1662. If such relinquishment is, within the period referred to, made by the husband or widow, then the next of kin may be appointed before the expiration of the forty days. In like manner, unless both the widow and the next of kin relinquish in the mode prescribed by section 1662, the largest creditor of the intestate residing in the State, should not be appointed until the expiration of forty days. If the husband or widow and next of kin do relinquish within that time, in the mode prescribed, then such creditor may be ap-

pointed after such relinquishments, and before the expiration of the forty days. But, under no circumstances, should any one not belonging to one of the first three classes specified in section 1668 be appointed, until the expiration of forty days after the death of the intestate is known, unless all the persons belonging to these three classes relinquish within that time. If the persons belonging to these three classes fail to apply for letters within the forty days, they must be held to have relinquished their right to the administration; and the court may then appoint any other fit and suitable person, with this exception, that the administration of the estate must not be committed to the general administrator, or to the sheriff or coroner, until the death of the decedent has been known sixty days.

It is hardly necessary to observe, that the rules here stated do not apply to the special administrations provided for by section 1676 of the Code.

[2.] If letters of administration are granted to any person, before, according to the rules just stated, they ought to be, such letters must be considered as having been improvidently issued; and we do not doubt, that it is both the right, and the duty of the court, to revoke them. The provisions of section 1696, specifying certain causes for which an administrator may be removed, do not apply to such a case, or destroy the inherent right of the court to revoke letters improvidently granted.—*Dunham v. Roberts*, 27 Ala. Rep. 701; *Mullanply v. County Court*, 6 Missouri, 563; 1 *Williams' Executors*, 479; *Muirhead v. Muirhead*, 6 Sm. & M. 451; *Mills v. Carter*, 8 Blackf. 203.

The application to have such letters revoked, may be made by any of the persons specified in the first three subdivisions of section 1668. Such persons are expressly authorized by section 1669 to apply for letters before the expiration of the forty days; and this seems necessarily to import a right on their part to ask for the revocation of letters improperly issued to another. When the administration has been granted to one person, an application for letters by another, unaccompanied by a prayer for

the revocation of those already issued, would appear to be simply nugatory. It seems to be a solecism to say that one of the persons named can, in the case supposed, before the expiration of the forty days, ask the court that letters may issue to himself, but cannot at the same time petition for the revocation of the letters which have been improperly granted to another.—See *Mills v. Carter*, 8 Blackf. 203. Whether any one not interested in the estate may not apply for a revocation of letters improvidently or prematurely granted to another, is a question which we need not now decide.—1 *Williams on Executors*, 478.

[3.] In the present case, the petitioner shows that he is the largest creditor of the intestate, residing in the State, and he therefore stands third in the order of those entitled to administration. If he had failed to apply for letters within forty days, he would have thereby forfeited his right; and hence it was proper for him to make the application before the expiration of that time, although it may not be shown that either the widow or next of kin had relinquished. Unless, however, the widow and next of kin had relinquished, the petitioner was not entitled to letters until after the forty days had expired; because, until then, in the absence of previous express relinquishments by the persons standing before him in the order established by law, his right was not perfected. The petitioner's application for letters to himself, and for the revocation of those previously issued to Williams, was, therefore, not prematurely filed; and if the widow and next of kin suffered forty days, after the death of the intestate became known, to elapse, without applying for letters, they thereby forfeited their right, and the administration ought to be committed to the petitioner, if he is in fact the largest creditor residing in the State, and is not rendered unfit by virtue of some of the reasons specified in sections 1658 and 1696 of the Code.

[4.] The right of administration is regulated by law, and cannot be delegated to another. If the person first entitled does not choose to qualify, he cannot nominate another as a substitute for himself, to the exclusion of the

right which the statute gives to those next in order. The widow of the intestate had, therefore, no power to transfer her right to a third person.—Mursey v. Webster, 4 Foster, 126; *Ex parte* Young, 8 Gill, 286; McBeth v. Hunt, 2 Strobbh. 335.

It results from what has been said, that the court erred in sustaining the demurrer to the petition.

The decree is reversed, and the cause remanded.

STONE, J.—I concur with the majority of the court in holding—

1st. That the appointment of Mr. Williams was irregular, and should have been revoked.

2d. That it was the privilege and legal duty of Mr. Curtis, if he intended—the first and second classes failing—to apply for letters of administration upon the estate of Mr. Burt, to make his application to the judge of probate within forty days after the death of the intestate was known; otherwise, he would have forfeited his right, as the largest creditor of the intestate, to the administration. Code, §§ 1668, 1669.

I will concede, further, that if Mr. Burt had left no widow, or next of kin entitled to share in the distribution of his estate; or, leaving such, they had severally renounced the administration, then the largest creditor, at any time after the expiration of fifteen days after the death of the intestate was known, might have filed his petition, and, averring and showing such facts, might then have claimed the appointment. In such case, if another should have been improperly appointed, he might also have had such appointee removed from the administration. Code, § 1675.

I may also safely concede, that it is both the privilege and the duty of the judge of probate, whenever he is made sensible that he has, in the appointment of an administrator, disregarded the provisions of the Code above cited, to revoke the letters of administration, *ex mero motu*.

When, however, a person, not previously known to the record, seeks to put in motion the machinery of the law,

and asks that judgment shall be pronounced upon the rights of another, I think it is a rule to which there is no exception, (save, perhaps, the case of public officers, prosecutors and informers,) that the applicant or suitor shall show that he has some present right, legal or equitable, to be affected by the result. No statute has made provision for an informer in the case under discussion; and I cannot, under the averments of Mr. Curtis' petition, perceive that he is, or ever will be entitled, under the law, to claim appointment as administrator of Mr. Burt's estate.

Let us suppose that to this petition it had been answered, that another person, next of kin to Mr. Burt, entitled to share in the distribution of his estate, had, within the forty days, applied for letters, and had tendered a satisfactory bond. On this state of facts, what judgment would the court pronounce on the *right* of Mr. Curtis to meddle in the administration? Certainly there can be but one answer. The court should, and probably would, adjudge that a wrong had been done, to the prejudice of a third party. That third party, however, would not be the largest creditor, but the next of kin entitled to share in the distribution.

The right to administer on the estate of a decedent, is a mere personal privilege. No public morality or policy is involved in it, further than that the legislature, doubtless for the purpose of preventing rivalry and exasperation, has declared certain preferences. This privilege, as in many cases is done, may be waived by the persons entitled, and no evil effect upon public or private morals or interests is believed to follow therefrom.

Another argument, however, is, with me, conclusive upon this question. The death of Mr. Burt intestate, being at the time an inhabitant of Lowndes county, gave to the probate court of that county jurisdiction to appoint an administrator upon his estate. Having jurisdiction to appoint, the fact that the trust was committed to one person, when another had a paramount claim to it, did not render the appointment void, but voidable—*revocable*. Being only voidable, it was valid, until some person, hav-

ing a legal right to complain, moved for, and obtained the judgment of the court setting it aside. Mr. Curtis, having but a possible, not fixed and legal right to the appointment, moved in this matter prematurely; and he cannot be heard to complain that his motion was overruled.

I hope it may not be considered a forced analogy, when I say that, to me, a suit for the inheritance, by one who stood in the relation of heir apparent to the holder of the legal title, would be as maintainable as the present. To render the analogy more striking, we may suppose that the ancestor, when the suit was commenced, was in *articulo mortis*, intestate, and not of testamentary capacity. Could such suit be maintained? I apprehend the maxim, *nemo heres est viventis*, answers the question.

Let me repeat, we are not reviewing the action of the probate court, in removing an administrator improperly appointed. We are asked to pronounce that the probate court erred in not granting the prayer of Mr. Curtis' petition, when, to my apprehension, he fails to show any authority, based on the ground stated in the opinion of my brothers, to invoke the action of that court or this. *Cutchin v. Wilkinson*, 1 Call, 3.

Whether the *interest* of Mr. Curtis as a creditor of the estate, independent of any claim to the administration which he may assert, authorized him to ask the removal of the administrator who had been improperly appointed, I do not now consider.

On the single point above considered, I dissent from the opinion of the majority of the court.

RHODES vs. OTIS.

[ACTION TO RECOVER DAMAGES FOR OBSTRUCTION OF WATER-COURSE.]

1. *Onus of proof on question whether stream is navigable.*—All streams below tide-water being, *prima facie*, public, while all above it are, *prima facie*, private, the *onus* of proof is on a party who claims that a stream above tide-water is navigable.
2. *What constitutes navigable stream.*—In determining whether a stream is navigable, inquiry should be made as to the following points: whether it is fitted for valuable floatage; whether the public generally, or only a few individuals, are interested in the transportation on it; whether any great public interests are involved in the use of it for transportation; whether its capacity for floatage continues for periods long enough to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and, if so, how long; how it was considered and treated in the government surveys; and whether, if declared public, it will probably be of public use for carriage in future. Tested by these principles, Bashi creek, in Clarke county, Alabama, under the evidence set out in the record in this case, is not a navigable stream.
3. *Whether stream is navigable, is question of law.*—When the facts are ascertained, it is a question of law for the court whether a stream is a public highway.
4. *Charge on effect of evidence.*—A party has the right to require the court to instruct the jury as to the legal effect of the evidence, when, after conceding all points on which there is a conflict of evidence, and all adverse inferences from the evidence, the undisputed facts establish a legal conclusion in his favor; and the refusal of such a charge when requested, unless some sufficient legal reason for the refusal is shown, will work a reversal of the judgment.
5. *License not within statute of frauds.*—A grant of the privilege of floating spars down a private stream, not involving the holding or occupation of the land, is a mere license, and not a contract within the statute of frauds.
6. *When license is irrevocable.*—A parol license to float spars down a private stream, obtained for valuable consideration, cannot be revoked by the grantor, when the grantee, having acted under it, would be injured by the revocation: the doctrine of estoppels *en pais* applies to such a case.
7. *Duplicity.*—A complaint in trespass on the case, which unites in the same count a cause of action growing out of the defendant's obstruction of the navigation of a public stream with his breach of duty under a contract with plaintiff respecting the navigation of the stream, is objectionable for duplicity.

APPEAL from the Circuit Court of Choctaw.

Tried before the Hon. C. W. RAPIER.

THE complaint in this case was as follows:

“William Otis } The plaintiff claims of the defendant
vs. } twenty thousand dollars, because the
James Rhodes. } plaintiff, having, in Clarke county,
upon or near a water-course, or creek, called Bashi creek,
which, in the winter-time, and at other rainy seasons, was
navigable by rafts of large size, and by vessels of many
tons burden, and which was at such times commonly used
for such navigation, been engaged in cutting, hewing,
and getting large sticks or pieces of timber, called spars,
the property of the plaintiff, to be used in the building
and completion of ships and other vessels; and the
defendant, who claimed to be the owner of a large tract
of land, lying and being on both sides of said creek, hav-
ing, to-wit, on the 22d March, 1854, for the price and sum
of twenty-five dollars paid to him by the plaintiff, con-
sented and agreed to permit plaintiff to use a parcel of
said tract of land upon said creek, and within and sur-
rounded by the rest of said tract, as a landing-place for
said spars, or place for deposit, rafting and launching, or
floating off of said spars, upon the waters of said creek,
and down the same to the Tombecbe river some three
or four miles, and to float said spars upon the waters of
said creek, and down the same, through his (defendant's)
premises; and the plaintiff having collected at said place,
formed into rafts there, and begun to float off said spars,
as he lawfully might and had the right to do, upon said
creek, when the waters thereof had risen, and the creek
became navigable as aforesaid, and down the same, for
the purpose of getting said spars to Mobile to market, as
he could have done; this mode of removing said spars
being the mode most convenient, and almost the only
practicable one to plaintiff, and of no disadvantage or the
least to the defendant,—he, the said defendant, and his
servants and agents by his command or procurement, to-
wit, on the — day of —, 1854, and on divers other
days thereafter, unlawfully and maliciously, by threats,
and by erecting obstructions, and by felling trees across
said creek, between said spars and the river, and other-
wise, forcibly hindered and prevented plaintiff from float-

ing off and carrying away said spars, which were of great value, to-wit, of the value of \$15,000, out of said creek, so that they might be sold, or used as aforesaid; and thereby caused a loss to plaintiff of the whole value of said spars, besides other great expense and damage, to the amount of \$20,000 as aforesaid, to-wit, in the county aforesaid."

The defendant demurred to the complaint, on the following specified grounds: "1st, because it does not show whether the action is founded on a contract or a tort; 2d, because, if it is founded on an alleged contract, it does not set forth the contract with sufficient certainty to show its terms; 3d, because, if it is founded on an alleged contract, it does not show a breach of that contract; 4th, because, if it is founded on an alleged tort, it does not show that Bashi creek was or is a navigable stream; 5th, because it does not show any right in the plaintiff to float or raft his spars down said creek, through the defendant's lands; 6th, because it does not show any illegal act of the defendant; and, 7th, because it is vague, uncertain, and insufficient in law." The court overruled the demurrer, and the defendant then pleaded the general issue, in short by consent; on which plea issue was joined, and a trial thereon had.

It appeared from the evidence adduced on the trial, as the same is set out in the bill of exceptions, that the defendant, in the years 1853, 1854 and 1855, owned a plantation in Clarke county, on both sides of Bashi creek; that the plaintiff had been engaged, during the summer and fall of the year 1853, in getting out spars above said plantation on the creek, and had got out a large number; that he had begun, in the fall of that year, to haul these spars to a point on the creek below the defendant's plantation, to be rafted and floated down the creek, during the ensuing winter and spring, to the Tombeckbe river, into which the creek emptied, and thence to Mobile; that the roads leading to the landing became bad, and the plaintiff then determined, for the purpose of avoiding the labor and difficulty of hauling the spars over them, to make a contract with the defendant, if he could, by which he

might obtain a place within the defendant's plantation for the deposit of his spars, and from which they might be floated down the creek through said plantation. "George Cox, a witness for the plaintiff, was asked by the plaintiff's counsel, whether an agreement on that subject was made between the plaintiff and defendant, and what were its terms. The defendant objected to the question, unless the agreement was in writing; and the witness stating that the agreement was not in writing, the defendant objected to the witness stating what the terms of the agreement were, on the ground that parol evidence was inadmissible to prove such an agreement, and that such agreement, unless in writing, was void under section 1551 of the Code. The plaintiff's counsel stated, that he expected to show that the agreement was for a term of less than one year, and that a consideration in money had been paid for it, and that the plaintiff had been put in possession under the contract as far as he could be; and the court thereupon overruled the defendant's objections, and allowed the questions to be asked; to which the defendant excepted."

The witness then testified in reference to the contract as follows: "Witness was then in the plaintiff's employment, and, at plaintiff's request, asked defendant if he would let the plaintiff have the use of a landing on the creek within his plantation for depositing his (plaintiff's) spars, and the privilege of rafting them down the creek through his plantation. The defendant agreed that plaintiff might do so, for twenty-five dollars. Witness understood that the spars were to be rafted down that season, but could not say that he had so told the defendant, or that the defendant so understood it." The defendant objected to the admission of this evidence, "on the ground before stated," and reserved an exception to the ruling of the court in admitting it. The witness Cox further testified, "that the plaintiff and defendant, in pursuance of this contract, selected a place on the creek within the defendant's plantation, a little below Bashi bridge, for the plaintiff to deposit his spars; that the defendant had a field of cotton there, and, to make room

for plaintiff's spars, the fences had to be moved, and about a half-acre of his cotton-field turned out, and the cotton on it lost; and that the plaintiff afterwards hauled and deposited spars there." The plaintiff also proved that, on the 2d March, 1854, he paid the twenty-five dollars to the defendant's overseer, and took his receipt for the same, wherein the money was acknowledged to be "in full settlement for use of land for spar-landing."

"Bashi creek, it was proved, ran through the defendant's plantation and lands. Its general direction was from east to west, and it emptied into the Tombeckbe river at a point about six miles distant in a direct line from the defendant's plantation. A public road, which ran through the eastern part of the plantation, crossed said creek within the plantation by a bridge, commonly called 'Bashi bridge.' The defendant's lands extended a mile or more below the bridge, on both sides of the creek, which ran through them in a winding course, and a part of the way through wooded land. To the eastward, above the defendant's lands, and about one-fourth of a mile above said bridge, another creek, called 'Tallahatta creek,' falls into Bashi creek. In the years 1853 and 1854, the defendant had fields in cultivation, on both sides of the creek, below said bridge, and above the bridge on the north side; but the creek was not enclosed within the fields in 1853, and never had been."

The plaintiff proved that, during the fall and winter of 1853, he collected a large number of spars at the landing-place below the bridge within the defendant's plantation, and at the junction of the two creeks, had them inspected as fast as possible, and prepared for rafting down the creek at the first rise; that the spars were from sixty-six to one hundred feet long, and from twenty-five to thirty-six inches thick; that his hands cleared out the creek, from the landing-places down to its mouth, cutting away the willows, drift, &c., and removing logs, so that the spars might be floated down without obstruction at the first rise; that a few days after the completion of this work, in the early part of March, 1854, there was a rise in the creek from head-water, by which he was enabled to float

down the river in safety about forty-three spars; that a second rise in the creek, higher than the former, took place a few weeks afterwards, and all of his hands were engaged on the rafts at the landings, preparing to float them off, when the defendant, with his overseer, came to the landing below the bridge, and forbade the floating of them through his premises, telling the men that, if they broke through his water-fences, it would be at their own peril; that the men nevertheless got the rafts afloat, and endeavored to carry them down the creek; that their passage was obstructed by two water-fences, and by a large sycamore tree which had been felled across the bed of the creek; that they succeeded in carrying the spars over the first fence, and a portion of them were with difficulty carried over and through the sycamore tree; but they were unable to get any of them over the second fence; that the waters of the creek fell while they were in this condition, and there was not another rise during the rest of the year, nor was there any rise during the winter of 1855, which was a remarkably dry season; and that the spars were consequently left in the creek, and became rotten and worthless. The plaintiff's evidence conduced to show, that these obstructions were placed in the creek by the defendant, or under instructions from him, for the purpose of preventing the passage of the plaintiff's rafts. The defendant's overseer, however, testified, that he had the tree felled across the creek, without instructions from the defendant, to enable persons to cross on foot; and that he had also erected the water-fences, under instructions from the defendant, to keep stock out of the plantation. In reference to these matters, there was some conflict in the evidence; but, as no question of law is involved in them, it is unnecessary to state all the evidence. The evidence was also conflicting, as to whether the passage of the rafts was prevented by these obstructions, or by the want of a sufficient rise in the river; the plaintiff's witnesses testifying, that the rise was sufficient, if the creek had not been obstructed; while the defendant's witnesses asserted the contrary.

“Much evidence was introduced on both sides in refer-

ence to Bashi creek, and whether it was a navigable stream or not. Several old citizens of Clarke county, who had known the creek for many years, testified, that the tide did not ebb and flow in it, nor in the Tombeckbe river at its mouth; that the creek rose in a high, hilly country, flowed westwardly, and emptied into the Tombeckbe river. Most of the witnesses stated, that from the source to the mouth of the creek, in a direct line, was from twenty to twenty-five miles; and one witness said, that it might, perhaps, be as much as thirty miles. The course of the creek was crooked, making the distance from its source to its mouth by the course of the creek greater than by a direct line. In the upper part of the creek, the fall was considerable, and the current rapid; but in the lower part, for a few miles above where Tallahatta creek emptied into it, it flowed through more level land, the fall was less, and the current not so rapid. The banks and bottom of the creek were generally sandy, and were so where it passed through the defendant's plantation, and formed some bars in its bed. In the summer time, and in dry spells, the water in the channel of the creek, in several places in defendant's plantation, was not more than six inches in depth. There was no evidence that the creek had ever been navigated by any boat or other water-craft, or had ever been used to float rafts, spars or timber, until the plaintiff attempted so to use it as hereinbefore stated. A number of citizens, who had lived on or near the creek, and had known it well for many years, testified, that they had never known it to be navigated in any manner, or to be used for floating rafts, spars or timber, before this attempt by plaintiff so to use it; and that no one had tried so to use it since.

“When there were high freshets in the Tombeckbe river, there would be back-water in the creek, to a distance and depth proportionate to the height of the water in the river. In very high freshets in the river, the back-water in the creek would extend up as high as Bashi bridge; and one witness said, he had seen it deep enough there to float a steamboat. Sometimes there were freshets in the creek from head-water, caused by rain, which

soon ran out. One witness said, that when the creek rose from a single day's rain, it would fall again in less than twenty-four hours, so that spars could not be floated down it from either of the landings through the defendant's plantation; but other witnesses testified, that when the ground was very wet prior to a heavy rain, the rise might last longer; and one witness thought, it might last as long as one week. When there were heavy rains for several days in succession, the rise would continue all that time; but as soon as the rain ceased, it would soon fall again—in twenty-four hours, one witness said; others said in about that time, and one thought it might, perhaps, last as much as a week. Ordinarily, rafts or spars could not be floated down the creek through the defendant's plantation: this could only be done when there was back-water in the creek from the river, or a freshet from head-water from rains. From the spring of 1854, until some time during the winter of 1856, there was not at any time water enough in the creek, either from back-water or from freshets, to float spars through defendant's plantation; but it was proved that this was one of the driest seasons ever known in this part of the country, and that steamboats did not run up the Tombeckbe river, during the winter and spring of 1854-5, higher up than to Demopolis in Marengo county. During the year 1858, on the contrary, there had been much rain; the Tombeckbe river had been generally very high, and the back-water from it had, for a considerable time, extended up the creek through the defendant's plantation to the bridge; some of the witnesses said, for two or three months.

“There was no proof that the creek, at any particular period or season of the year, where it flowed through the defendant's plantation, could be relied on for floating rafts or spars; but there were some times, in most years, when, from freshets or back-water, it could be used for that purpose. Witnesses, who had known the creek well for many years, were asked to estimate and state to the jury what length of time, or what number of days in the year, of an ordinary average year as to rain, the creek

could be so used. Several of them said, that it was so uncertain they could make no satisfactory estimate. The witness Lewis, who had known the creek well for more than fifteen years, said, that, on an average, one year with another, he supposed it might be so used for floating rafts, taking every day, as much as two months from freshets, and from head-water and back-water together as much as two and a half or three months. Some other witnesses made about the same estimate, and none estimated it higher than three months. The width of the creek, below its junction with the Tallahatta, was greater in some places than in others. Some witnesses estimated its average width from bank to bank, at the top of the banks, at one hundred feet, or upwards, and from seventy-five to eighty feet at the bottom of the banks; other witnesses estimated it at less; while all of them stated, that they had never before known of any rafts being floated down it from as high up as the bridge, nor any boat to go up or down it, and that no spars had been got on that stream before or since. It was proved, however, that the business of getting spars is of recent origin. There is no site on the creek for a mill below the mouth of the Tallahatta, and freshets and back-water would prevent its being used for that purpose. It is about six miles, in a direct line, from the mouth of Tallahatta, where it empties into Bashi creek, to where Bashi creek empties into the Tombeckbe river."

"The court charged the jury, among other things, as follows: 'The plaintiff claims damages of the defendant on two grounds: 1st, that Bashi creek is a navigable stream and public highway, and that he has been damaged by obstructions placed in it by the defendant; or, 2dly, that if it was not a navigable stream, he has a right to use it for floating down spars through the defendant's plantation by contract with the defendant. It is the province of the jury to determine from the evidence, under the law as charged by the court, whether or not the creek is a navigable stream and public highway. To make a stream a navigable stream and public highway, it must have an aptitude for public servitude, by

being capable of floating vessels, boats, or rafts: if it can be so used only occasionally, and for but short periods of time, it is not a navigable stream; but if a stream is of such a character that it can be used, with convenience and advantage to the public, for a considerable part of the year, for floating boats, vessels, rafts, &c., during an ordinary average year, for as much as two or three months in all, though sometimes only for a few days at a time, it is a navigable stream in law. If the jury believe from the evidence that Bashi creek, during an ordinary average year, can be used for floating rafts of spars, conveniently and beneficially, for as much as two or three months in all, though sometimes for only two or three days at a time, it is a navigable stream and public highway, and the defendant had no right to put any obstructions in it; and if he did put obstructions in it, and the plaintiff could not remove or cut them out without delay or difficulty, and was thereby damaged, the plaintiff has a right to recover from the defendant in this action the amount to which he was thereby damaged. If the creek is a navigable stream, the plaintiff had a right to remove any obstructions put in it by the defendant, and it was his duty to remove them, and not wantonly to abandon his property and throw the loss on the defendant, if the obstructions were of such a character that the plaintiff could have removed them in time to save loss. But, if the jury believe from the evidence, under the law as charged by the court, that Bashi creek is not a navigable stream and public highway, then it is the defendant's private property where it passes through the defendant's plantation, and he had a right to put his water-fences across it; and the plaintiff has no right to complain of this, unless the defendant had given him a right of way along it by a valid contract. In this view of the case, the jury will have to determine from the evidence whether or not there was such a valid contract between the parties. It is true, as insisted by the defendant's counsel, that no contract is valid which, by its terms, is not to be performed within a year, unless it is in writing; but, if by the terms of the contract it is uncertain and indefinite as to the time of

performance, that is, if it is not expressly stated in words, the jury may judge from the circumstances whether it was the understanding and meaning of the parties that it was to be performed within a year ; and if so, it is valid, though not in writing. It is also true, as insisted by the defendant's counsel, that a right of way over a man's lands is an easement, or servitude ; and that if a contract is made for such a right of way, for a longer term than one year, it is void, unless in writing. But a parol contract, granting such a right of way for a term of one year or less, for a valuable consideration, is valid and binding on the parties, *though not in writing* ; and if by the terms of the contract the length of time for which the right of way was given was not expressly specified, the jury may judge from the circumstances whether or not it was the understanding and meaning of the parties that it should only be used for a year or less ; and if so, the contract is valid, though not in writing.' ”

The defendant reserved an exception to this charge, and then requested the following charges :

“1. That where a stream, which can only be used occasionally, and when there is back-water or a freshet, for navigation or floating rafts, runs through a plantation, it is so far the private property of the owner of the lands on each side, that no other person has a right to use it for the purpose of floating timber along it through such plantation.” This charge the court refused to give as asked, but gave it with this qualification, “that if the stream could be used advantageously for floating rafts, during an ordinary or average year, for as much as two or three months in the whole, though sometimes for only two or three days at a time, it would be a navigable stream, and other persons would have the right to use it for floating rafts during the time it was navigable ;” to which qualification, as well as to the refusal of the charge as asked, the defendant excepted.

“2. That a right to float timber along such a stream, through the lands of another, is an easement, or servitude, and an interest in lands within the meaning of section 1551 of the Code ; and that no contract for such a right is

valid, unless it is in writing, as provided by that section of the Code.

"3. That there is no evidence in this case of such a contract as was binding on the defendant to permit plaintiff to float his spars down Bashi creek through the defendant's plantation.

"4. That the evidence in this case is not, in law, sufficient to prove that Bashi creek is a navigable stream, or public highway.

"5. That if the jury believe from the evidence that the contract was made for the right to land spars on defendant's lands, and to float them through his lands, it was for an interest in lands; and that such a contract, if not reduced to writing, was void, although it might not have specified that it was to be performed within one year."

The court refused each of these charges, and to each refusal the defendant excepted; and he now assigns as error all the rulings of the court on the pleadings and evidence, and in the instructions to the jury, to which he reserved exceptions.

WM. G. JONES, for the appellant, made these points:

1. The demurrer to the complaint should have been sustained. It is a violation of the plainest, best-settled rules of pleading. It embraces a cause of action *ex contractu* and another *ex delicto*, not only in the same action, but in the same count. It is in fact difficult, if not impossible, from the confused manner in which matters *ex contractu* and matters *ex delicto* are mingled in the complaint, to tell whether the pleader intended to proceed for a breach of contract or for a tort. In either point of view, no good cause of action is shown. If the action be case for obstructing a navigable stream, the complaint should have averred that the stream was navigable. If it be for a breach of contract, the terms in which the contract is stated are too indefinite, and no sufficient breach is alleged. The defendant could not know how to plead to such a complaint. In an action on a contract, no evidence of malice could be given, and no vindictive

damages be assessed; but, in case, it might be different. One portion of the jury might believe that there was a contract, and a breach of that contract, but that the creek was not a navigable stream; while the other portion might believe that there was no contract, but that the creek was navigable. Such a confused mode of pleading cannot be allowed.

2. The court erred in its rulings as to the validity of the alleged contract, and the admissibility of parol evidence of its terms. If the creek was a navigable stream, the plaintiff had a right to use it without any contract or permission from the defendant; and a contract for the right of way would be a nullity. If, however, the creek was a private stream, the right to float spars down it could only arise from a valid contract. Such right of way is an easement, or servitude; it is an incorporeal hereditament; a thing which lies in grant, and not in livery. At common law, independently of the statute of frauds, such a right could only be granted by deed, no matter for how short a time. On this point see the following authorities: Co. Litt. 42; 1 Thomas' Coke, 717; Browne on Statute of Frauds, 23-30, § 232; Archbold on Landlord and Tenant, (53 Law Library,) 2; Hewlins v. Shippam, 5 B. & C. 221; Wood v. Ledbitter, 13 M. & W. 838, 842; Cooke v. Stearns, 11 Mass. 533; Riddle v. Brown, 20 Ala. 412, 418. It is also clear on principle, and is so laid down by the best authorities, that a right of way, or any other easement, is an interest in lands, within the meaning of the statute of frauds; and, consequently, that every contract for it, not in writing, is void. Cases cited *supra*. In Riddle v. Brown, 20 Ala. 418, the contract was in reference to a right to dig ore, granted by parol, for valuable consideration, for an indefinite and uncertain time; and the court said in reference to it, "A verbal contract for an easement like this would have no more binding force in law, under the statute of frauds, than if it had been simply for the land itself."

There is no force whatever in the idea on which the court below acted, that the case comes within the exception as to leases for a year or less. It may be doubted

whether a right of way can be the subject-matter of a lease. But, conceding that it might be, the contract in this case contains none of the elements or characteristics of a lease. There was no rent reserved by it. It was a grant for an indefinite time. The authorities are clear, that such a grant of an incorporeal hereditament, or even of land, at common law, was a grant of a freehold for life; while our statute makes it a grant in fee. Yet the court below allowed parol evidence of such a contract to be given to the jury, and instructed them that it was valid, though not in writing, if they believed from the circumstances that the parties contemplated and intended its performance within a year.

3. The undisputed facts in the case showed that Bashi creek is not, in law, a navigable stream, or public highway. It is above tide-water. It has never been navigated by any boat, vessel, or water-craft whatever, though the country through which it flows has been settled for many years. No one has ever attempted to use it for the purposes of rafting, with the single exception of the plaintiff's attempt in this case. To hold such a creek a navigable stream, will manifestly be not *pro bono publico*, but *pro hac vice* to benefit the plaintiff in this particular case. No case can be found, which justifies the court in charging the jury, as matter of law, that a shallow, fresh-water creek, which has never been used for purposes of navigation or rafting, and which cannot be so used generally, nor even at any stated period of the year, is, in law, a navigable stream, if it can be used, from freshets or back-water, as much as two or three months in the year, though only for two or three days at a time. Such a principle would convert almost every little creek, bayou, and many spring-branches, into public highways. The doctrine is contrary to common understanding, common law, common justice, and many adjudged cases. Such streams have uniformly been held to be private property, and not public highways.—Woolrych on Water Courses, 41; Angell on Water Courses, §§ 535, 535 *a*; Rex v. Montague, 4 B. & C. 598; Munson v. Hungerford, 6 Barbour, 265; Curtis v. Keesler, 14 Barbour, 511; People v. Platt, 17 John.

195; *Ellis v. Carey*, at June term, 1857, of this court. The court will take judicial notice of the fact, that Bashi creek was not treated as a navigable stream by the United States surveyors.—*Wright v. Phillips*, 2 Greene's (Iowa) R. 191; 1 Greenleaf on Ev. §§ 8, 9; 1 Halstead's Law of Evidence, 328.

A. R. MANNING, *contra*.—1. Under the provisions of the Code, a demurrer can only be allowed for matter of substance, which must be specified in the demurrer. Duplicity was not assigned in this case as a ground of demurrer; and if it had been specially assigned, it would not have been good. Several of the forms expressly authorized by the Code, not only in complaints, but also in indictments, would have been demurrable for duplicity at common law.

2. If the use of a water-course through a person's lands, for the purpose of floating a lot of spars down it, be an interest in real estate, within the meaning of the statute of frauds; a letting of such use to another, for a term not exceeding one year, may still be made by parol contract.—Code, § 1551. An incorporeal hereditament may be made the subject of a lease.—2 Bla. Com. 317–18. But, even if the contract was not valid as a lease, it was a legal license to the plaintiff to use the stream for the specified purpose; and being founded on valuable consideration, it could not be revoked by the defendant after the plaintiff had been induced to act under it, and when he was in such a situation that the revocation would necessarily injure him.—Browne on Statute of Frauds, § 27; *Wood v. Manly*, 11 Ad. & El. 34; *Wood v. Ledbetter*, 13 Mees. & W. 853; *Patrick v. Colerick*, 3 Mees. & W. 482; 20 Viner's Abr., tit. *Trespass*, H, a, 2; *Le Fevre v. Le Fevre*, 4 Serg. & R. 245; *Rerick v. Kern*, 14 Serg. & R. 267; *Wilson v. Chalfant*, 15 Ohio, 248; *Heeney v. Heeney*, 2 Denio, 625; *Dubois v. Kelly*, 10 Barbour, 508; 2 American Leading Cases, 535, *et seq.*

3. The law in regard to navigable streams was correctly laid down in the affirmative charge given by the court. Code, §§ 1205, *et seq.*; 3 Kent's Com. 427; Angell on

Highways, §§ 53, 54, 70; Shaw v. Crawford, 10 John. 246; Brown v. Scofield, 8 Barbour, 243.

4. The bill of exceptions shows that the evidence was conflicting on nearly every material point in the case; and the rule is well settled, that a party has not, in such case, a right to demand a general charge on the effect of the evidence. Moreover, the evidence was so voluminous, that the court could not be required to charge on its general effect.—Knox v. Fair, 17 Ala. 503. To hold that a party has the right to require the court to give such a charge, no matter how conflicting or voluminous the evidence may be, would impose on the judge the necessity of taking down all the testimony in writing, and, in effect, would be equivalent to requiring a joinder in a demurrer to evidence.

A. J. WALKER, C. J.—The word navigable has, in the English common law, a technical meaning, and is used to describe public rivers where the tide ebbs and flows. Angell on Water Courses, 604, § 542; 3 Kent's Com. 512; Stuart v. Clarke, 2 Swan, 9; Scott v. Wallace, 3 N. H. 321; Morgan & Harrison v. Reading, 3 S. & M. 366; Comm'rs v. Withers, 29 Miss. 21; *Ex parte* Jennings, 6 Cow. 518.

The charges given and refused in this case manifestly use the word *navigable* in its common, and not in its technical acceptation; and in that sense we will understand it, for the purposes of this opinion.

It is undoubtedly true, as held by this court in *Ellis v. Carey*, 30 Ala. 725, that all streams below tide-water are, *prima facie*, public; and all above tide-water are, *prima facie*, private, not subject to a public right of floatage upon them.—*King v. Montague*, 4 B. & C. 598; Angell on Water Courses, 596, § 535; *Mayor of Colchester*. 7 Ad. & E. 33, (53 E. C. L. 339;) *Miles v. Rose*, 5 Taunt. 705, (1 E. C. L. 240;) *Wadsworth v. Smith*, 11 Maine, 278; *Morgan v. King*, 18 Barb. 277.

Bashi creek, being above tide-water, is, *prima facie*, not a navigable stream. The *onus* of proof was, there-

fore, upon the party claiming for it the character of a navigable stream.

[2.] It is difficult, perhaps impossible, to define with precision the fresh-water streams, which are public, or, in the common acceptation of the term, navigable. A reference to the decisions will aid us in ascertaining the principles upon which the question is to be decided, as to the creek mentioned in the bill of exceptions in this case.

The test laid down in the *People v. Platt*, 17 John. R. 211, of a fresh-water stream, in which the public have an easement for purposes of transportation and commercial intercourse, is their susceptibility of use *as a common passage for the public*. The navigability of the Hudson at Stillwater is placed upon the ground, that it was, *beneficially to the public*, subservient of rafting.—*Palmer v. Mulligan*, 3 Caines, 318. Lord Hale describes navigable streams as of sufficient depth for *valuable floatage*.—Angell on Water Courses, 596, § 535. In *Wadsworth v. Smith*, 11 Maine, (2 Fair.) 278, it is said, those streams, which are sufficiently large to bear boats or barges, or to be of *public use* in the transportation of property, are highways by water, over which the public have a common right.

The South Carolina court, while declining to define a navigable stream, said, that that would not be a navigable stream, the natural obstructions of which prevented the passage of any boats whatever.—*Cates v. Wadlington*, 1 McCord, 583; see *Wilson v. Forbes*, 2 Dev. Law, 30; *Ingram v. Threadgill*, 3 Dev. Law, 61. In Tennessee it is held, that the public have an easement in shallow streams, which are of sufficient depth for *valuable floatage*, as for rafts, flat-boats, and, perhaps, small vessels of lighter draft than ordinary.—*Stuart v. Clark*, 2 Swan, 16; *Elder v. Burrus*, 6 Humph. 364.

The language of the decision in *Munson v. Hungerford*, 6 Barb. 370, is: "A stream, to be navigable within the authorities, *must furnish a common passage for the King's people; must be of common or public use for carriage of boats or lighters; must be capable of bearing up and floating vessels for the transportation of property, con-*

ducted by the agency of man. It is not enough that a stream is capable (during a period, in the aggregate, of from two to four weeks in the year, when it is swollen by the spring and autumnal freshets) of carrying down its rapid course whatever may have been thrown upon its angry waters, to be borne at random over every impediment, in the shape of dams or bridges, which the hand of man has erected. To call such a stream *navigable*, is a palpable misapplication of the term."

It is intimated, though not decided, in *Brown v. Scofield*, 8 Barbour, 239, that the courts will take judicial notice of such streams as are public highways; and in determining whether the Carristo river is navigable, stress is laid upon the fact, *that it had been used as a highway, since the settlement of the country*; and the remark is made, "that these great natural channels and avenues of commerce, whenever they are found of sufficient depth to float the products of the mines, the forests, or the tillage of the country, through which they flow to market, have always been adjudged by our courts to be subject to the right of passage, independent of legislation."

The question in *Curtis v. Keesler*, 14 Barbour, 511, was whether Calikoon creek was a navigable stream. The proof was, that the tide did not ebb and flow in the stream; that, in its natural state, it was not capable of floating a log; that when swollen by freshets, or the melting of snow, it would bear up a raft, or single logs of timber; that it *had been occasionally* used, for many years, *by a few persons*. Declaring that a stream, to be navigable, must be a *common passage for the King's people*; must be of *public use* for carriage of boats and lighters; must be capable of bearing up and floating vessels for the transportation of property, conducted by the agency of man, the court held, that the stream was not navigable.

In *Morgan v. King*, 18 Barbour, 277, it was decided, that a stream might be public, although useful only to float single logs without manual guidance; and that a stream, upon which and its tributaries saw-logs, to an *unlimited amount*, would be floated every spring, and for a period of from four to eight weeks, and for the distance

of a *hundred and fifty miles*, and upon which unquestionably *many thousands would be annually transported for many years to come*, has the character of a public stream for that purpose. See, also, *Brown v. Chadbourne*, 31 Maine, 9; *Moore v. Veazie*, 32 Maine, 343.

Morgan v. King, *supra*, presented a peculiar case, where the immense forests of valuable timber, contiguous for a great distance to the stream, which flowed along the great slope from the south towards the St. Lawrence, made the creek the means of transportation for the marketable product of the labor and enterprise of a great number of people, throughout a large extent of country. *The number of people* interested in the use of the stream for a particular purpose, the *magnitude* of the *public* interests involved, and the fitness of the stream for the carriage of the peculiar article of commerce of a large section of country, were controlling elements in that case.

Rowe v. The Granite Bridge Corporation, 21 Pick. 344, decides, that a creek, below tide-water, would not be public, unless it was "*navigable to some purpose useful to trade and agriculture.*"

The length of time, for which an appropriation to public use has existed, is prescribed as one of the tests, though certainly not a controlling one, of a navigable stream. *Woolrych on Waters*, 40: *Shaw v. Crawford*, 10 Johns. 246. Force is given, in most of the cases, to the consideration, that the stream had or had not been long used for public purposes.—*King v. Montague*, 4 B. & C. 96. This consideration is entitled to less weight in a new, than in an old country; but the country through which the creek upon the character of which we are passing flows, is not so new as to make it unimportant.

Another inquiry, which is of some importance, in testing the character of a stream, is whether it was omitted from the government surveys.—*Ellis v. Carey*, 30 Ala. 725.

From the somewhat conflicting authorities which we have examined, we attain the conclusion, that in determining the character of a stream, inquiry should be made as to the following points: whether it is fitted for valuable floatage; whether the public, or only a few individu-

als, are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors, or included in the surveys; whether, if declared public, it will probably in future be of public use for carriage. And in the application of these inquiries to the facts of a case, it is to be remembered that the *onus probandi* is upon the party claiming that a stream above tide-water is public.

Applying the tests above indicated to this case, we decide, that Bashi creek is not a navigable stream. There is no proof that Bashi creek can be used for any purpose, save the floating of timber. There was no proof that the creek could be used, even for that purpose, for a greater distance than about six or seven miles in a direct line. It had never been used before by any person for transportation in any way. It has never been used since by any person for that purpose. It is not shown that there are large and extensive forests, fitted to afford timber for market, contiguous to the stream; nor is it shown that any great business of transporting timber on it can ever spring up. It does not appear that the public generally, or any large number of persons, will ever use the stream for such purpose. Indeed, the short distance to which the stream can be used, affords a strong argument, that no large number of persons will probably ever use it for floating timber. The stream, even below the mouth of Tallahatta creek, can only be used for floatage in freshets from head-water, or from back-water from the Tombeckbe river. In case of freshets from head-water, it can be used for floating rafts only for a very short time; because the creek, being a short one, runs down very soon. The seasons being unusually dry, it was impracticable, from the spring of 1854, to some time in the winter of '56, to float spars out of the creek; thus showing that, for long periods of time, it is totally useless, even to float logs. The highest estimate

of the aggregate of the brief periods, when it might be used for the short distance for floating rafts and logs on account of freshets and back-water, is three months. The creek is not shown to have been excepted from the government surveys. Upon such evidence, it cannot be held, that Bashi creek is a navigable stream. It is not sufficient to show that a contingency has arisen, or may arise, in which a particular individual can use the stream for a valuable purpose. The public must be interested, before it can become a public highway.

The holding such streams to be public highways, would be productive of great and extensive injury to individuals and the public. A large number of creeks in the State, never thought of as navigable streams, might be used for floating rafts, for as long a time in each year, and, perhaps, for a greater distance, if advantage were taken of every rise, however short in duration. Every mill-dam on any of those creeks, every bridge over them, every water-gap, and every foot-log, could be treated as a nuisance, at the option of any individual, who might think proper to go up the stream and prepare a raft of timber, to await a rise from a freshet, to float his raft down; and he might sue the owners of mills for all damage sustained, in consequence of the interference of the dams. To regard such streams as navigable, could subserve no useful public purpose, and might prove detrimental to the great manufacturing interests of the State, as well as to the public interest in having suitable bridges on the public roads. *Moffett v. Brine*, 1 Iowa, 348: *Varick v. Smith*, 9 Paige, 553; 5 Ind. 103.

[3.] When the facts are ascertained, the question whether the stream is a public highway, is a question of law.—*Morgan v. King*, 18 Barb. 285. Making every intendment in favor of the plaintiff, which would be proper on a demurrer to evidence, we think the law pronounces the judgment, that Bashi creek was not a navigable stream; and we decide, therefore, that the court below erred in refusing to charge the jury, that upon the evidence in this case the creek was not a navigable stream.

[4.] There is no tendency of proof to the conclusion, that the floatage upon the stream has ever been, is now, or ever can be, valuable to the public generally; and while the proof may be conflicting in its description of the stream, there is no conflict as to facts indispensably necessary to make it a navigable stream. In such a case, it is certainly a right of the parties to have from the court a declaration of the legal effect of the evidence, unless some sufficient legal reason for not giving it exists. *Knapp v. McBride & Norman*, 7 Ala. 29; *Hollingsworth v. Martin*, 23 Ala. 597; *Swift v. Fitzhugh*, 9 Porter, 67; *Skinner v. State*, 30 Ala. 526; *Knight v. Bell*, 22 Ala. 206; *Woolfork v. Sullivan*, 23 Ala. 558; *Powell v. Williams*, 27 Ala. 52; *Crum v. Williams*, 29 Ala. 446. But the court cannot be required by a party to charge the jury, as to the legal effect of the entire evidence, unless, after the concession of all points upon which there was a conflict of evidence, and of all adverse inferences from the evidence, he is entitled to the charge. We do not deny, that no error could be predicated of a refusal by the court to charge the jury, as to oral testimony, that there was no evidence of any particular fact, because the presiding judge did not remember whether there was or not.—*Knox v. Fair*, 17 Ala. 503; *Lancaster County Bank v. Allbright*, 21 Penn. State, 228. Whether a presiding judge could legally excuse himself for the omission to give such a charge, upon the ground that he did not remember the evidence, it is not necessary for us to decide, because no such ground of refusal was assumed in this case, and the legitimate inference from the bill of exceptions is, that its refusal was a rejection of the legal proposition involved.

[5.] The plaintiff in this case claims damages, not only upon the ground that Bashi creek was a navigable stream, but that he had a right resulting from contract to float his spars down it. It is a debated point between the counsel, whether the contract that the plaintiff might float his spars through the lands of the defendant, was a mere license, or the transfer of an interest in land, within the statute of frauds. A license is defined by Kent to be

an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. 3 Kent's Com. 592; Riddle v. Brown, 20 Ala. 412. The distinction between an easement within the statute of frauds and a license, is sometimes difficult of discernment; but there can be no doubt, that the privilege of floating the plaintiff's spars upon a private stream of the defendant, which does not involve the holding or occupation of the real estate, is within the definition of a license. Indeed, the books abound in cases, where privileges on land, of a much more fixed and lasting character, have been held to be mere licenses.—Wood v. Ledbetter, 13 M. & W. 837; Browne on Statute of Frauds, 30, §§ 27–28; 2 Platt on Leases, 23; Dubois v. Kelly, 10 Barb. 496; Cook v. Stearns, 11 Mass. 537; Davis v. Townsend, 10 Barb. 334; Jamison v. Milliman, 3 Duer, 255; Wilson v. Chalfant, 15 Ohio, 248; Le Fevre v. Le Fevre, 4 S. & R. 241; Rerick v. Kern, 14 S. & R. 267; Angell on Water Courses, chap. 8.

[6.] It is true that parol licenses, unexecuted, are generally, though not universally, held to be revocable, even when they are made upon a valuable consideration. The question in this case is not whether the license was revocable before it was acted on: it is whether the license can be revoked after it had been obtained for a valuable consideration, and the plaintiff, acting under it, had conveyed his spars to the creek, and placed them in it, ready to be carried down the stream by the anticipated rise, when the revocation would work great injury to the plaintiff, and when the exercise of the authority conferred would involve no occupancy of the defendant's land. There are, we admit, some authorities which would allow a revocation of the license, even under these circumstances; but we are not willing to follow them. It would be against all conscience to permit the defendant to revoke his license, after the plaintiff had acted upon it so far that great damage must necessarily result from the revocation. Every reason upon which the doctrine of estoppels *in pais* rests, applies. It is a plain case, where one party has, by his conduct, induced another to act in

such a manner, that he cannot be allowed to retract without serious injury to that other person. We think a denial of the right of revocation, under such circumstances, is consistent with justice and right, supported by the analogies of the law, and many respectable decisions.—*Rerick v. Kern*, 14 S. & R. 267; *Nettleton v. Sikes*, 8 Metcalf, 34; *Angell on Water Courses*, 5 div. of chap. 8; *Hall v. Chaffee*, 13 Vermont, 150; *Bridges v. Purcell*, 1 Dev. & Bat. (N. C.) 492; *Sheffield v. Collier*, 3 Kelly, (Ga.) 82; *Le Fevre v. Le Fevre*, 4 S. & R. 241.

[7.] We think, upon the averments in the declaration, *Bashi creek* would be a navigable stream. The complaint contains, therefore, a cause of action predicated upon an alleged interference with, and obstruction of, the plaintiff's right to navigate a public stream. This cause of action is in trespass on the case. The complaint also contains a cause of action for an infringement by the defendant of the plaintiff's right growing out of a contract with the defendant, and a breach of the defendant's duty under that contract. This was, also, a cause of action in case.—*Myers v. Gilbert*, 18 Ala. 467; *Wilkinson v. Mosely*, 18 Ala. 288. The declaration, therefore, contains two complete causes of action.

The judgment of the court below is reversed, and the cause remanded.

McCARTNEY'S EXECUTORS vs. BONE AND WIFE.

[BILL IN EQUITY TO SET ASIDE PROBATE OF WILL.]

1. *Probate of will, duly executed and attested, set aside on account of insufficiency of proof as to testator's knowledge of its contents.*—Where it appeared that the testator, several months before his death, when his health began to decline, executed a will, by which he bequeathed his entire estate to his mother, who was his sole heir-at-law and next of kin; that on the day before his death, being then very feeble and greatly prostrated by sickness, he executed another will, by which he gave a legacy to his uncle, the pro-

McCartney's Ex'rs v. Bone and Wife.

ponent, who was also his attending physician and guardian, and who had never made a settlement of his guardianship; that no person was present when the latter will was prepared, except the proponent and the attorney by whom it was written, the attorney having been sent for by the proponent; and that the testator had not been heard to express any dissatisfaction with the former will,—*held*, that the probate of the latter will was properly set aside, because it was not affirmatively shown that the will embodied instructions given by the testator, or that he was made acquainted with its contents when he signed it.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by Matthew H. Bone, and Martha, his wife, against the executors and legatees of Fleming J. McCartney, deceased, and sought to set aside the probate of the said McCartney's will, which had been admitted to probate by the probate court of said county. The testator was the son of Mrs. Bone by a former husband. The executors of the will were Dr. Fleming Jordan and Robert C. Brickell; the former being the uncle and guardian of the testator. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainants, setting aside the probate of the will; and his decree is now assigned as error. The material facts of the case are stated in the opinion of the court.

HUMPHREYS & TRACY, with JAMES PHELAN, for the appellants:

The following facts are affirmatively shown by the evidence in the case—that the will was signed by the testator in the presence of the subscribing witnesses, and attested by them in his presence; that the testator was of sound mind at the time he signed the will, as also before and after its execution; that the will was made in conformity with the previously expressed intentions of the testator; that the will is natural in its disposition of property, making ample provision for the testator's mother, with remainder on her death to his cousins, who were his next of kin; that the testator disliked his mother's present husband, and always said that he should not have his property; and that he was a man of firm determination,

who could not be easily induced to change his mind. Moreover, the allegation of undue influence is denied by the answers, and entirely unsupported by proof.

1. All the statutory formalities are proved to have been strictly complied with in the execution of the will. Section 1610 of the Code, so far as it relates to the execution of the will, is a substantial transcript of the statute 29th Charles II, ch. 3, which required no publication of the will by the testator, as a separate and distinct act from an observance of the statutory formalities.—Roberts on Wills, 101; 26 Wendell, 330; 7 Taunton, 360; 8 Paige, 490; 3 Atk. 161; 7 Bing. 457; 3 Hagg. 557; 1 Phil. (Ec.) Rep. 191; 6 Bing. 310. A will may be good, under the statute, without any words of the testator declaratory of the nature of the instrument, or any formal allusion to, or recognition of it.—2 Greenl. Ev. § 632; 1 Jarman on Wills, 71; 6 Bing. 310; 7 Bing. 457; 4 Kent's Com. 515. On proof of the signature, it will be presumed that the testator knew the contents of the will.—1 Phil. (Ec.) R. 191; 3 *ib.* 476; 3 Hagg. 587. It is not necessary that the subscribing witnesses should be acquainted with the contents of the will.—19 Ala. 80. Nor is it necessary to prove that the will was read over to the testator, or that he knew the contents of it.—1 Phil. (Ec.) Rep. 187; 1 Greene's Ch. R. 549.

2. A compliance with all the requisitions of the statute, as to execution and attestation, having been affirmatively shown, the probate can only be resisted on proof of undue influence, or of testamentary incapacity on the part of the testator; neither of which is shown. The words *unsound mind*, as used in the statute, are legal terms, and import a total deprivation of reason. There is no grade of understanding, between the highest and the lowest, which incapacitates a testator. A capacity to recollect, discern, and feel the relations of family, &c., is sufficient. Mere weakness of mind, short of insanity, is not sufficient to avoid a will.—26 Wendell, 255; 6 Geo. 357; 3 Denio, 37; 5 Johns. Ch. 158; 4 Wash. C. C. 262; Shelford on Lunacy, 37; 4 McCord, 185; 9 Conn. 102; 2 Add. (Ec.) R. 441; Chitty on Contracts, 135; 2 Kent's Com. 452;

10 Serg. & R. 84; 1 Jarman on Wills, 50. A just distribution of his property by a testator, in accordance with the natural affections, and consistently with previously expressed intentions, furnishes very strong evidence of capacity.—26 Wendell, 313; 2 Add. (Ec.) 441; Wharton's Med. Jur. 13; 1 Jarman on Wills, 69.

3. On the question of undue influence, see 2 Phil. (Ec.) R. 551; 22 Ala. 529; 28 Ala. 100.

L. P. & R. W. WALKER, *contra*:

It is essential to prove that the testator knew, at the time of execution, that it was his will.—Gerrish v. Nason, 22 Maine, 438; Swett v. Boardman, 1 Mass. Rep. 258; 2 Greenl. Ev. § 675.

If the testator be incapable at the time of reading his will, no matter from what cause, it must be shown affirmatively that he was acquainted with the contents.—Day v. Day, 2 Greene's Ch. 549.

Where testator's capacity at time of execution is in any degree doubtful, there must be proof of instructions, or reading over.—Tomkins v. Tompkins, 1 Bailey, 92; Billingham v. Vickers, 1 Phil. 187; Harvey v. Anderson, 12 Geo. 69.

If there is reasonable ground to believe that the will was not read by the testator, or that there was fraud or imposition of any kind, (though not sufficient to establish a case of fraud or undue influence,) knowledge of contents must be distinctly shown.—Harrison v. Rowan, 3 Wash. C. C. 585; Weir v. Fitzgerald, 2 Bradf. 42.

The presumption is strong against a party preparing a will, who takes an interest under it, and the court will require proof of knowledge of contents; and if testator was feeble, and fiduciary relations existed, the demand for the proof is much stronger.—Tomkins v. Tomkins, 1 Bailey, 92; Hill v. Barge, 12 Ala. 687; Parke v. Ollatt, 2 Phil. 323; Ingram v. Wyatt, 1 Hagg. 384; Beall v. Mann, 5 Geo. 456; Baker v. Batt, 1 Curteis, 125; Sankey v. Lilly, 1 Curteis, 397. The inference is clear here, that the will was written at Jordan's instance; that he suggested its provisions, and that he sent for the attorney.

He was physician and guardian, and he and his children take an interest under the will.

The court must be satisfied, not only that testator was of testable capacity, but that he had an intelligent understanding of the contents and effect of the instrument. Where capacity is weakened, and there is any evidence of influence or imposition, proof of knowledge of contents is required. In case of enfeebled mind, (still having capacity,) the will must be shown to have been fairly made—to have been the testator's spontaneous act, without interposition of others, and to have accorded with previous intentions.—*Burge v. Hill*, 1 Brad. 360; *Mowry v. Silber*, 2 Brad. 133; *Moore v. Moore*, 2 Brad. 261.

In case of a will made by interrogatories, the court is very guarded in requiring proof of capacity, spontaneity, and volition.—*Greene v. Skipworth*, 1 Phill. 53; *Rogers' Ec. L.* 912–13.

Where a will is made *in extremis*, evidence of volition and capacity, incontestable and incontrovertible, is required.—*Rogers' Ec. Law*, 907; 1 Hagg. 262, 310, 227; 2 Hagg. 169.

As to the vigilance used in cases where fiduciary relations exist between testator and writer, or procurer, and as to other points in the case, see particularly the following cases: *Wilson v. Moran*, 3 Brad. 172; *Carroll v. Norton*, 3 Brad. 291; *McGuire v. Kerr*, 2 Brad. 244; *Dent v. Bennett*, 7 Simons, 539; *Gale v. Wells*, 12 Barb. 84; *Greville v. Tylee*, 24 Eng. L. and E. 53.

STONE, J.—We feel authorized by the proofs in this record to lay down the following propositions as established:

1. That Fleming J. McCartney, the testator, did, on the 11th June, 1853, execute by signing the paper propounded as his will, in the presence of two subscribing witnesses; and that they subscribed their names as witnesses in his presence;

2. That at the time testator was notified that the paper he signed was his will;

3. That Mr. McCartney, although at the time in very

low health, cannot be pronounced to have been legally incompetent to make a will;

4. That there is no evidence in this record, which, as an independent proposition, authorizes us to affirm that this will was obtained by undue influence.

It is contended for contestants, that the circumstances of the execution of this will are such, as to cast on the proponents the necessity of proving, either that the will was drawn pursuant to instructions previously given, or that it was read over to the testator. In considering this question, it is necessary that we should first ascertain and settle the controlling facts, as established by the evidence. We do not propose to consider the testimony of the numerous witnesses *seriatim*, but to state briefly the principal facts which it establishes.

Some interrogatories propounded to witnesses were objected to. We find in the record, however, no exceptions filed to any part of the testimony; and hence we infer that the judgment of the chancellor was not asked upon the relevancy or legality of any of the proof. Under these circumstances, we will not consider this question. *Jordan v. Jordan*, 17 Ala. 466.

Testator, at the time of his death, was twenty-two or twenty-three years old. He left surviving him neither wife, child, brother or sister, nor descendant of them. His mother, a second time married, survives him. He left a valuable real and personal estate.

Some months before the death of Mr. McCartney, his health gave way; and for more than a month, it is obvious that he entertained apprehensions that he could not recover. He spoke freely of making his will; spoke of his uncle, Fleming Jordan, in complaining terms, as having been his guardian, and made a fortune out of his estate; as being indebted to him, and that he could not obtain a settlement from him; expressed a determination to make ample provision for his mother, who seemed to be the chief, if not the sole object of his solicitude. About this time he made a will, which, the testimony tends to show, gave to his mother his entire estate. We hear no complaint of, or dissatisfaction with this will,

until the evening of the 10th of June, two days before his death.

During the illness and decline of Mr. McCartney, the proponent, Dr. Jordan, who was a physician, was much with him; and as the disease became more malignant, his attentions were correspondingly increased. Testator continued to manifest an interest in his worldly affairs, until about a week, or a little less, before his death. From that time forth he was laboring under great physical exhaustion, and, with the exception of making a second will, after stated, he gave no attention to business. He conversed but little, and usually only in reply to remarks addressed to him. He lay, say the witnesses, usually with his eyes closed, and volunteered to speak, only when he desired something done to alleviate his suffering. During this period, his principal concern was for his spiritual welfare.

On Friday afternoon, the 10th, Dr. Jordan had been some time with his patient; and the testimony tends to show that no other person was present. He left him late in the evening, taking with him a messenger on the horse of testator, to be dispatched by Dr. Jordan from his house, the next morning, for the attorney to write another will. The only evidence of a change of testamentary disposition, desired by Mr. McCartney, is furnished by Dr. Walker, the then partner of Dr. Jordan, who says, that when Dr. Jordan came from deceased on the evening of the 10th, he informed him (witness) that McCartney was dissatisfied with the will, and had concluded to send for his attorney, that a second one might be prepared.

On the 11th, the attorney came. He and Dr. Jordan were in the room with the testator while the will was being written; and two subscribing witnesses were called in, saw the will signed, and attested it as witnesses. The testimony fails to show that any instructions were given by Mr. McCartney, as to the frame of the will or its dispositions; and it fails to show that the will was read over either by or to him. He was then so feeble, that it is scarcely conceivable that he did or could read the will himself. We are not informed that the testator's mother,

or any other friend, save those mentioned above, was called in during the preparation or execution of the will. This will makes Dr. Jordan a legatee, but we have no means of ascertaining the value of the legacy.

Under the circumstances disclosed in the proof, we do not hesitate to declare, as our opinion, that testator's capacity for business was greatly impaired; that the only evidence of a change in his wishes, is furnished by what Dr. Jordan said; that Dr. Jordan was the chief counsellor in the preparation of that will, as he was the chief instrument in having the attorney brought for the purpose; and that this was done without the presence, sanction, or advice of Mr. McCartney's mother, who was in the house, and was the chief object of his bounty. It may also be here repeated, that Dr. Jordan had been guardian of testator's property, and no settlement of the guardianship had ever taken place.

In the case of *Billinghurst v. Vickers*, 1 Phil. 199, Sir John Nicholl said, "that where the capacity is doubtful at the time of execution, and there is no evidence of instructions, especially when the act is done through the agency of the party interested, the proof of mere execution is insufficient."

In the case of *Day v. Day*, 2 Greene's Ch. 549, testator was in *extremis*, but of testable capacity. The proof of execution was satisfactory. The will was prepared by one who took a benefit under it; and there was no evidence of instructions, or that testator was made acquainted with the contents. On the contrary, it was made almost certainly to appear that the will was not read over. The court pronounced against the will, saying, among other things, "It becomes the duty of the person offering the will, to show that the contents of the paper were fully made known to the testator." The court said, the same rule applied when testator was incapable of reading the will, either from blindness, sickness, or any other cause.

In the case of *Tompkins v. Tompkins*, 1 Bailey, 92, the court said, "When the capacity of a testator at the time of the execution is in any degree doubtful, there must be proof of instructions, or of reading over."

In *McGuire v. Kerr*, 2 Brad. (Sur.) Rep. 244, the court said, "When, at the time of execution, the decedent was in a state of stupor, though perhaps capable of being aroused so as to perform a sensible action, the proof to establish a rational act should be of the clearest character; and that failing, probate should be denied."

See, also, *Rogers' Eccl. L.* 906, where it is said, "A will made in *extremis*, and almost in *articulo mortis*, may be good, if its validity be established by sufficient evidence of volition and capacity; but, if the facts of the case present grounds for suspicion, evidence of volition and capacity, incontestable and incontrovertible as to its truth and effect, must be required, if the court intends to exercise a proper vigilance, and guard with necessary jealousy the beds of dying persons against fraud and circumvention."

To the same effect are the cases of *Harrison v. Rowan*, 3 Wash. C. C. 580; *Brogden v. Brown*, 2 Add. (Eccl.) 442; *Gerrish v. Nason*, 22 Maine, 438; *McNinch v. Charles*, 2 Rich. Law, 229; *Burge v. Hill*, 1 Bradf. (Sur.) 360; *Harvey v. Anderson*, 12 Geo. 69; *Ingram v. Wyatt*, 1 Hagg. 384; *Sankey v. Lilly*, 1 Curteis, 397; *Mowry v. Sibler*, 2 Bradf. (Sur.) 133; *Moore v. Moore*, *ib.* 261; *Hill v. Barge*, 12 Ala. 687.

Another principle should not be lost sight of. We allude to the double fiduciary relation which Dr. Jordan sustained to the testator, both as his guardian and attending physician. In *Gale & Wising v. Wells*, 12 Barb. (S. C.) Rep. 84, the court said, "When a guardian, soon after the ward becomes of age, but while the latter is still at college, and before the guardian has settled his accounts with his ward, procures the ward's endorsement to a note, made by the guardian for the payment of a precedent debt owing by the guardian to a third party, who takes such note and endorsement with notice of the circumstances, a recovery cannot be had on such endorsement."—See *Hatch v. Hatch*, 9 Vesey, 296; *Wilson v. Moran*, 3 Bradf. (Sur.) 172.

So, in the case of *Greville v. Tylee*, 24 Eng. Law and Eq. 53, a will was prepared and written by a medical man

in attendance on a testatrix, at that time dangerously ill, and without professional advice, by which he was made the principal object of the testatrix's bounty, to the exclusion of her near relations. The testimony was clear, that testatrix had intended to provide for Dr. Greville; but it did not appear that she intended to make him the principal object of her bounty. The court pronounced against the will, remarking that Dr. Greville had nobody but himself to blame; that the interests of the public required that his conduct should be scrutinized with the utmost jealousy.—See, also, *Dent v. Bennett*, 7 Simon, 539; *Paske v. Ollatt*, 2 Phill. 323; *Baker v. Batt*, 1 Curt. 125; *Hill v. Barge*, 12 Ala. 687.

Applying these principles to this case: Mr. McCartney, when he executed the paper, which is claimed as his will, was almost in *articulo mortis*, and must have relinquished his chief hold upon life; from protracted disease and great physical exhaustion, he may be said to have sunk into a general stupor, though capable of being aroused to consciousness, adequate, for the time, to the transaction of ordinary business; there is no evidence that he, *sua sponte*, conceived any desire to change or modify the disposition of his property, made previously, and with deliberation; his guardian and attending physician, and who was probably benefited by the change of will, seems to have been alone with him, during the time when it is alleged he underwent this change of purpose, and when the second will was being prepared; and his mother, who was obviously dearest to him, though in the house, as we have the right to presume, does not appear to have been called in or consulted. To this we may add, that all visible and outward agency and preparation for the draft and execution of a second will were performed, so far as the testimony informs us, by Dr. Jordan, although testator had a mother, step-father, and overseer on the premises. While we concede that all these surroundings are capable of satisfactory explanation, consistent with the purest integrity, still, as a matter of public policy and sound judicial morality, we hold, that they cast on the proponent the *onus* of showing by affirmative proof—either facts

or circumstances—that testator had either given instructions, which were embodied in his will, or that he was made acquainted with the contents thereof. The proof in this record failing in this particular, the decree of the chancellor is affirmed.

R. W. WALKER, J., having been of counsel, did not sit in this case.

BLAKEY'S HEIRS *vs.* BLAKEY'S EXECUTRIX.

[CONTESTED PROBATE OF WILL.]

1. *Parties to proceeding.*—In a contest before the probate court respecting the validity of a will, the proponent is the party plaintiff, and the contestants are the defendants; and the other heirs-at-law, or distributees, though notified of the proceeding, are not parties to it, unless they come forward and make themselves parties.
2. *Motion to suppress deposition on account of incompetency of commissioner.*—A deposition, taken in Texas, will not be suppressed on account of the incompetency of the commissioner by whom it was taken, on proof of the simple fact that a person of the same name, who had lived in Alabama, was a brother-in-law of one of the parties to the suit.
3. *Competency of former proponent as witness for will.*—A person named executor in the will, who has formally renounced the executorship, is a competent witness to sustain the will, although it is shown that he had once propounded the will for probate, but had dismissed his proceeding before the second application was made, and had not paid the costs.
4. *Admissibility of proponent's declarations as evidence against will.*—The declarations of the proponent, he not being the sole legatee, are not competent evidence to defeat the probate of a will, when all the other legatees are neither contesting parties, nor consent to the admission of the declarations.
5. *When witness may testify to ignorance of fact.*—Where the situation of a witness was such that, if a certain fact had existed, he would probably have known it, his want of knowledge is some evidence (though slight) that it did not exist; and he will be allowed to testify, in such case, that if the fact existed, he did not know it.
6. *Competency of special administrator as witness for will.*—A special administrator of the estate is a competent witness for the proponent of a will, (Code, § 2302,) although a decree admitting the will to probate would have the effect of placing him in a state of security against some of his official acts.
7. *Mode of impeaching witness.*—The testimony of a witness on immaterial points cannot be contradicted for the purpose of impeaching him.

8. *Charges on mental capacity, fraud, and undue influence, approved.*—The several charges given by the court in this case, in reference to testamentary capacity, fraud, and undue influence, held correct, on the authority of the following cases: *Coleman v. Robinson*, 17 Ala. 84; *Leverett v. Carlisle*, 19 Ala. 80; *Gilbert v. Gilbert*, 22 Ala. 529; *Taylor v. Kelly*, 31 Ala. 59; *Dunlap v. Robinson*, 28 Ala. 100; *Hughes v. Hughes*, 31 Ala. 520.

APPEAL from the Probate Court of Bibb.

IN the matter of the last will and testament of Joseph A. Blakey, deceased, which was propounded for probate by the testator's widow, and contested by his six children by a former marriage. The will contained legacies in favor of each of the contestants, consisting of several slaves and several hundred dollars, described as having been already delivered to them; and bequeathed the residue of the testator's estate, both real and personal, to his wife for life, with remainder to her two children by him. The executors named in the will were, Henly Snead and George W. Blakey; the latter being one of the testator's children and one of the contestants. The grounds of contest were, fraud, misrepresentation, undue influence, and insufficiency of execution and attestation.

Before the trial was entered upon, as appears from the bill of exceptions, the proponent moved the court to suppress the deposition of Margaret Whitman, "on the ground that Nelson H. Rice, the commissioner by whom said deposition was taken, was a brother-in-law of Theodorick S. Blakey, one of the contestants." "On this motion, the following facts were adduced in evidence before the court: One Henly Snead testified, that he knew Nelson H. Rice in Alabama, who was the brother-in-law of said Theodorick S. Blakey. The deposition appeared on its face, and from the post-marks on the envelope, to have been taken in Texas. There was no proof as to the handwriting in which it was taken, or that the signature of the commissioner was in the handwriting of that Nelson H. Rice known by Snead in Alabama; nor was there any other evidence as to the identity of that Nelson H. Rice with the commissioner." The court suppressed the deposition, and the contestants excepted.

The proponent offered Henly Snead as a witness, who

was one of the subscribing witnesses to the will, and also one of the executors therein named. The contestants objected to his competency on the ground of interest; and on his examination on his *voir dire*, the following facts were shown to the court: "That witness had heretofore propounded said will for probate in this court, and, after it had been pending for some time, and after some costs had accrued, he had dismissed his said application, and filed in said probate court his written renunciation of the executorship, which was accepted by said court; that he had not paid said costs, and thought they ought to be paid out of the estate, but he was bound for them, and could pay them; and that he did not know, if the will was admitted to probate, whether he would become the executor thereof or not, nor whether he would have a right to become executor or not." The court overruled the objection to the competency of the witness, and allowed him to be examined; to which the contestants excepted.

The contestants introduced evidence conducing to show that the will was procured by the exercise of undue influence over the testator by the proponent; and for this purpose they adduced proof of the testator's declarations, both before and after the execution, to the effect that he did not wish to make such a will, but was induced to make it by his wife's importunities, "and for the sake of peace in the family." One Stanley, a witness for the contestants, who testified to these declarations of the testator, further stated, "that Dr. Gradick attended him [testator] in his sickness, and that Dr. Gradick then lived in Centreville in said county;" also, "that he [witness] had known the testator for about twenty years, lived within a mile of his house, and had always been very friendly and intimate with him, until three or four years before his death, when a coolness sprang up between them on account of a school." The proponent, in rebuttal of the evidence adduced by the contestants, introduced a witness who testified, "that he [witness] came to Centreville in March, 1853, and that Dr. Gradick did not reside there during any portion of the balance of that year;" and another witness who testified to declarations of the wit-

ness Stanley, made fifteen years before the trial, to the effect that unfriendly relations then existed between him and the testator. The contestants objected to the competency of the testimony of each of these witnesses, and reserved exceptions to the rulings of the court in admitting it.

The contestants offered to prove declarations and admissions of the proponent, made after the execution of the will, in substance as follows: "that her husband had made a will, and had given all his property to his and her children; that she never let him rest, day or night, until he had made the will to her notion, and that she was then satisfied." The court excluded this evidence, on the proponent's objection, and the contestants excepted.

"The proponent introduced one Logan as a witness, who stated, that he boarded at the testator's house before the date of the will, and at different times from 1849 up to the date of the will. The proponent then asked said witness, if he ever knew of any serious difficulty between the testator and the proponent. To this question the contestants objected, but the court allowed it to be asked; and the witness answered, that he knew of no serious difficulty between them. To this answer also the contestants objected, but the court overruled their objection; and to both these rulings of the court the contestants excepted."

"The proponent offered to introduce one Dr. Moren as a witness, who stated, on his *voir dire*, that he was the special administrator of said Joseph A. Blakey's estate, having been appointed by said probate court in October, 1857, (under an order which was read in evidence,) to act as such administrator until the will of said decedent should be admitted to probate; that he had been acting as such administrator from the time of his appointment; that he had allowed the proponent and her two children to live on the plantation on which the testator lived at the time of his death; that the plantation had been carried on, under his directions, with the slaves and other property of the estate, and the proponent and her two children had been supported therefrom; and that he had

allowed one of the negroes belonging to the estate to wait about the house for the proponent and her family. It was admitted by the proponent, that the rent of the land and the hire of the negroes were worth more than the crop raised on the plantation during the present year." The contestants objected to the competency of the witness on these facts, and reserved an exception to the overruling of their objection:

"The court charged the jury, among other things,—

"1. That a will is unequal to the testator's children or relations, is no legal reason, that it should be considered an irrational act; and the law puts no restrictions upon a man's right to dispose of his property in any manner his partialities, pride or caprice may prompt, if he is of sound mind and disposing memory.

"2. Fraud is a trick, artifice, or management, which induces a person to dispose of his property, or to do some act, contrary to his wishes, or in such a way as he would not but for such fraud. The burden of proving fraud, in this case, is on the contestants; and unless they have satisfied the jury by the testimony in the case that this will was procured by some artifice, trick, or management, and that the testator, but for such artifice, trick, or management, would not have made this paper as his last will as it is made—— (?)

"3. Undue influence is influence that amounts to, or is equivalent to moral coercion; it must constrain the testator, or the subject of it, to do what is against his will, but which, from fear, the desire of peace, or some other feeling, *which* he was unable to resist.

"4. The burden of proving undue influence is on the contestants; and unless they have satisfied the jury by the evidence that undue influence was exercised over the testator, to such a degree as to amount to moral coercion, which the testator was unable to resist, and that such influence caused or produced the will, and that the testator, but for such influence, would not have made a will, or would have made a will different from the one offered for probate,—this issue would not be established, and the jury could not find it in favor of the contestants.

"5. If the jury believe from the evidence that the contestants have not satisfied the jury that the paper offered for probate was procured by fraud, or that it was the result of undue influence, but that it was the well-understood, free act and will,—then the jury should find in favor of the will, if the testimony as to the signature satisfies them that it was signed and attested as the law requires."

To each of these charges the contestants excepted, and they now assign the same as error, together with all the other rulings of the probate court to which they reserved exceptions.

The appellee submitted a motion to dismiss the appeal, on the two grounds, that the proper parties were not made, and that the appeal bond was insufficient on account of a misdescription of the decree; both objections being founded on the fact, that only the proponent and the contestants, without the other heirs-at-law, were named as parties to the decree and appeal. The motion was argued and considered at the same time with the other points in the case.

I. W. GARROTT, for the appellants.

J. R. JOHN, *contra*.

R. W. WALKER, J.—1. When a will is propounded for probate, the proceeding is *in rem*. The object of the statute which requires that notice of the application shall be given to the widow and next of kin of the testator, is that such persons may, if they choose, make themselves parties to the proceeding. When notified, they have the option to stand by passively, or take an active part on either side. But they cannot be considered parties to the suit, unless they come forward, and, by some affirmative act, engage in the litigation. Hence, when an issue is formed in the probate court, between the proponent and persons contesting the will, the former is deemed the plaintiff, and the latter are considered the defendants. They alone are the parties to the suit. It follows, that the decree in this case is correctly described, as having been

rendered in a case in which the proponent was plaintiff, and the contestants defendants; and that the appeal was properly taken in the name of the contestants, without joining the next of kin who had not made themselves parties. The motion to dismiss the appeal is, therefore, overruled.—Code, § 1634; *Sawyer v. Dozier*, 5 Ired. 97; *Deslonde v. Darrington*, 29 Ala. 92.

2. We think that the court erred in suppressing the deposition of Margaret Whitman. The only evidence that the commissioner was the brother-in-law of one of the defendants, was the mere identity of name. The deposition was taken in Courtland, Texas, by Nelson H. Rice; and proof that there was a Nelson H. Rice, who had lived in Alabama, and was the brother-in-law of one of the defendants, was not sufficient, without more, to raise the presumption that he was the person of that name who had taken the deposition. If there had been evidence that the brother-in-law had removed to Texas, or that he was in Courtland at the time when the deposition was taken, the result might have been different.—See *Desha, Shepherd & Co. v. Stewart*, 6 Ala. 852; *Colgin v. Redman*, 20 Ala. 650.

3. The witness Snead had formally renounced the executorship, and dismissed the proceeding instituted by him to have the will admitted to probate. Under these circumstances, we see no reason which would render him an incompetent witness to sustain the will, in a subsequent proceeding in which another person was the proponent. The fact that he was liable for costs in the former case, which he had instituted and dismissed, cannot affect his competency in this proceeding.—See *Burritt v. Silliman*, 3 Kernan, 93; *Sawyer v. Dozier*, 5 Iredell, 97.

4. It is the settled law of this court, that the declarations and acts of a proponent, who is not the sole legatee, are not admissible in evidence to defeat the probate of the will. If all the other legatees were contesting the will, or consenting to the admission of the testimony, the rule would doubtless be different.—*Roberts v. Trawick*, 13 Ala. 68; *Walker v. Jones*, 23 Ala. 448; *Bunyard v. McElroy*, 21 Ala. 311; *Taylor v. Kelly*, 31 Ala. 73. There was no

error, therefore, in excluding the various declarations and acts of the proponent, offered in evidence by the contestants.

5. The proponent had the right to rebut the evidence which the contestants had introduced, to show the state of feeling between the testator and the proponent, who was the principal legatee; and for this purpose, the testimony of the witness Logan, though entitled to but little weight, was relevant. This witness is shown to have had opportunities for knowing the state of feeling between the testator and his wife; and his testimony comes within the influence of the rule, adopted by this court, that "when the situation of a witness is such, that if a certain fact had existed, he would probably have known it, his want of knowledge is some evidence, though slight, that it did not exist.—Nelson v. Iverson, 24 Ala. 9; Ward v. Reynolds, 32 Ala. 384.

6. Under the Code, (§ 2302,) it is not a sufficient reason for excluding a witness, that the effect of a judgment in favor of the party who introduces him would be to place him in a state of security. His competency depends upon the question, whether the verdict and judgment would be evidence for him in another suit; and the test whether they would be evidence for him, is the inquiry, would they be evidence against him if adverse to the party introducing him? In other words, the witness is competent, unless the verdict and judgment would be evidence for or against him in another suit, according as they may be for or against the party calling him.—Harris v. Plant, 30 Ala. 634; Atwood v. Wright, 29 Ala. 346. As a decree, refusing to admit this will to probate, would, as to the witness Moren, be *res inter alias acta*, and therefore could not in any subsequent suit be evidence against him, he was not incompetent.—Authorities *supra*; see, also, Coalter v. Bryan, 1 Grattan, 86.

7. The contestants introduced as a witness one Stanley, who, in the course of his testimony, stated, that he had been upon friendly terms with the testator, until within a few years before the death of the latter; that in September, 1853, he (the witness) was sick, and that at that time

one Dr. Gradick, who was his attending physician, lived in Centreville in Bibb county. The court allowed the proponent to contradict this witness upon the points just mentioned, by proving a declaration, made by him many years before the trial, that he and the testator were not on good terms; and by showing that Dr. Gradick did not live in Centreville at the time stated by Stanley. Construing the bill of exceptions most strongly against the appellant, we must presume that these statements of the witness, which the court permitted to be disproved, were made on his examination in chief, either voluntarily, or in response to questions from the party introducing him.

"It is a well-settled rule, that a witness cannot be cross examined, as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him. And if a question, which is collateral or irrelevant to the issue, is put to a witness, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him."—1 Greenl. Ev. § 449, and cases. In *Ortez v. Jewett*, 23 Ala. 662, this court said: "You cannot question a witness, or allow the other party to question him without objection, about a matter not relevant to the issue, in order to lay a ground for impeaching him, by calling witnesses to disprove what he says." In that case, a witness had, in the course of his testimony, and, as it would appear, upon his examination in chief, sworn to a fact irrelevant to the issue, and the defendant offered evidence to disprove this statement. This court held, that it was not permissible to do so.

It is true that a different rule was announced in *Dozier v. Joyce*, 8 Porter, 303, in which, while it was admitted that a witness cannot be cross examined as to a collateral fact, for the purpose of contradicting and thus impeaching him; yet, it was held that, if the witness voluntarily swears falsely, as to matters not within the issue, he may be impeached by contradicting him. In that case, it seems to have been considered, that the main reason for the rule, which prevents a cross examination upon immaterial matters for the mere purpose of contradicting the witness, is, that he cannot be presumed to come prepared to defend

himself on such collateral questions; and as this reason fails when the testimony is voluntarily given, the rule itself does not in that case apply. The reason referred to is doubtless one of those on which the rule is founded, but it is not the only, or even the chief one. The principal reasons of the rule are, undoubtedly, that but for its enforcement the issues in a cause would be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be perplexed and confused, and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial investigations would become almost interminable. An additional reason is found in the fact, that the evidence not being to points material in the case, witnesses guilty of false swearing could not be punished for perjury. 1 Greenl. Ev. § 448; Powers v. Leach, 26 Verm. 270. These reasons apply equally whether the evidence on such collateral matters is brought out on the examination in chief, or upon cross examination, and whether the witness gives it voluntarily, or in response to questions calling for it. Almost every witness who testifies in court is apt to connect with the material facts stated by him some matters wholly collateral and impertinent; and it would be intolerable to allow all such incidental statements to be taken advantage of for the mere purpose of contradicting and thereby impeaching the witness. If such a practice were sanctioned, every trivial circumstance mentioned by a witness might become the subject of a separate and subordinate issue, which would have nothing whatever to do with the real question to be determined, but would inevitably serve to confuse the jury and prolong the trial. These considerations induce us to prefer the conclusion attained in the case of *Ortez v. Jewett*, *supra*, to the rule adopted in *Dozier v. Joyce*, *supra*.

Stanley's testimony went mainly to show certain acts and declarations of the testator, in reference to his making a will. The statements that he and the testator were on friendly terms, and that Dr. Gradick lived in Centreville at the time when the witness was sick, appear as purely

incidental matters, and could not be relied on by the contestants as tending to establish any fact pertinent to the issue. The only purpose which could be subserved by contradicting the witness on these points, would be to discredit him before the jury; and this being the case, we think that the court erred in admitting the evidence offered to disprove the statements referred to.

This conclusion is not inconsistent with the ruling of this court in several cases, in which it has decided, that where one party introduces illegal testimony, he cannot complain on error that the court permitted the other party to rebut it; the principle being, that testimony inadmissible in itself becomes competent by the introduction of other evidence to which it may be a reply. In all the cases in which this rule has been asserted, the evidence which was allowed to be rebutted, although inadmissible according to legal principles, was yet of such a character, or had such a relation to the facts in issue, that, if contradicted, it would probably exert some influence upon the minds of the jury in reference to the question to be decided by them. The rule has no application, where the facts testified to are not only wholly collateral to the issue, but obviously could not, even if true, exert any influence upon the minds of the jury in making up their verdict. Besides, the right allowed is to introduce evidence simply for the purpose of *rebutting* illegal testimony, and of thus neutralizing its effect, and not for the purpose of discrediting a witness.—See *Havis v. Taylor*, 13 Ala. 326; *Findley v. Prewitt*, 9 Porter, 195; *Nelson v. Iverson*, 24 Ala. 9; *Rogers v. Wilson, Minor*, 407; 3 Phill. Ev. (3d ed. 1850) 594; 4 *ib.* 723.

8. The several charges to the jury, given by the court, seem to be unobjectionable. They are fully sustained by the authorities, and are, for the most part, expressed in the language employed by this court in the following cases: *Coleman v. Robertson*, 17 Ala. 84; *Leverett v. Carlisle*, 19 Ala. 80; *Gilbert v. Gilbert*, 22 Ala. 529; *Taylor v. Kelly*, 31 Ala. 59; *Hughes v. Hughes*, 31 Ala. 520; *Dunlap v. Robinson*, 28 Ala. 100; see, also, 1 Wms. on Ex'rs, 42.

We have not been able to discover any errors in the record, other than those we have indicated.

For the errors pointed out, the decree of the probate court is reversed, and the cause remanded.

BANK OF MOBILE vs. MEAGHER & CO.

[ACTION TO RECOVER VALUE OF LOST BANK-NOTES.]

1. *Section 2151 of the Code, respecting actions on lost bills and notes, construed.*—Section 2151 of the Code, which provides a remedy on certain instruments lost or destroyed, being a substantial re-enactment of the act of 1828 on the same subject, and, therefore, to be regarded as a legislative adoption of the judicial construction which the former statute had received, does not abrogate any common-law remedy for the recovery of bank-notes lost or destroyed; nor does the proviso to that section, declaring that it “must not be so construed as to authorize a suit for the recovery of a note or bill issued by any incorporated bank to pass as money, and alleged to be lost or destroyed,” amount to an inhibition of an action at law on such lost note or bill.
2. *When action lies on lost or destroyed bank-note.*—An action at law does not lie against a bank, to recover the value of a lost note or bill, which, passing from hand to hand by delivery merely, might be presented to the bank by the finder for payment; but, when a bank-note has been destroyed, thus rendering it impossible that the bank can be made to pay it a second time, the owner at the time of the loss may maintain an action against the bank for its value, and is not compelled to go into chancery.
3. *Sufficiency of complaint in description of bank-notes.*—It is not necessary, in the description of the lost notes on which the suit is founded, to aver their dates, or the time when they were payable: the courts will take judicial notice of the fact, that they were payable on demand.
4. *Identification and proof of contents of lost bank-notes.*—In an action to recover the value of bank-notes lost or destroyed, it is incumbent on the plaintiff to first prove the existence and loss of the notes, and then to adduce proof of their contents; and proof of their aggregate amount and issue by the bank, without other evidence of their identity and contents, is not sufficient to authorize a recovery.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by T. & J. M. Meagher, suing as partners, against the president, directors and company

of the Bank of Mobile, to recover the value of certain bank-notes, which were destroyed by the burning of the steamboat *Orline St. John* in March, 1850. The complaint was as follows:

“The plaintiffs claim of the defendant the sum of \$1400, due on fourteen bills, commonly called bank-bills, made and issued by the defendant, each being for the sum of \$100; which said bills were the property of the plaintiffs, and, on the 6th day of March, 1850, were destroyed by fire on the steamboat *Orline St. John*, and were a total loss to the plaintiffs; and being so destroyed, the said plaintiffs afterwards demanded payment of the same of the defendant, which said defendant refused and still refuses to make; wherefore plaintiffs sue, and claim the sum of \$1400, with interest thereon.

“The plaintiffs also claim of the defendant the sum of \$1400, the amount of certain bills, commonly called bank-bills, made and issued by the defendant, amounting to \$1400; which said bills, being the property of the plaintiffs, on the 6th day of March, 1850, were destroyed by fire on the steamboat *Orline St. John*, and were a total loss to the plaintiffs; and being so destroyed, the said plaintiffs afterwards, to-wit, on the 1st day of April, 1850, demanded payment of the same of the defendant, which the defendant then and there refused to make, and still refuses so to do; wherefore the plaintiffs sue, and claim the said sum of \$1400, with interest thereon.

“The plaintiffs also claim of the defendant the further sum of \$1400, for so much money had and received by the defendant, on the 6th day of March, 1850, for the use of the plaintiffs; which said amount, although the plaintiffs demanded the same, the defendant refused to pay, and still refuses; which said sum, with interest thereon, is still due and unpaid.

“The plaintiffs also claim of the defendant the further sum of \$1400, for so much money paid by the plaintiffs, for the defendant, on the 6th day of March, 1850, at the request of the defendant; which sum the defendant refuses to pay, although requested so to do; and the plaintiffs claim interest on said sum, which is now due.”

The defendant demurred to each count of the complaint, on the following specified grounds: "1st, that no sufficient cause of action to charge defendant is shown in either of said counts; 2d, that no bill is sufficiently described, in either the first or second count, to warrant a recovery, or to charge the defendant, and no sufficient notice to the defendant is shown, nor demand, nor time, nor particulars; and, 3d, that said third and fourth counts are not sufficiently specific, nor is the complaint set forth with sufficient particularity to entitle the plaintiff to recover." The court sustained the demurrer to the second count, and overruled it as to the others; and the defendant then pleaded the general issue, and the statutes of limitation of three and six years.

On the trial, as appears from the bill of exceptions, the plaintiffs first read in evidence the deposition of one Allen B. Dulany, who testified in reference to the existence and loss of the bank-notes as follows: "I was clerk and book-keeper of the steamer *Online St. John*, on and prior to the 5th day of March, 1850. Said steamboat was destroyed by fire, on the 5th March, 1850, while navigating the Alabama river, just above Bridgeport in Wilcox county, at or near the plantation of Mark H. Pettway, and on the west side of the river. At the time of the fire, there was in the clerk's office of said steamer, in the drawer of the desk, a large amount of the bills of the Bank of Mobile. I am certain that there was fully \$1400 of said bills, and my impression is that there was a larger amount. As clerk of said boat, I was in the habit of making out a cash balance on each trip of the boat, and, in doing so, to state particularly the amount of uncurrent money received, also of the amount of gold, bills of the Bank of Mobile, &c. My recollection of the amount of money, in bills of the Bank of Mobile, on hand at the time said steamboat left Mobile on her upward trip in which she was burned, is about the sum mentioned. I had also collected passage-money in the usual way at the time the fire occurred, but do not know the amount collected." (On cross examination.) "The money on the boat at the time of the fire was in a drawer attached to the clerk's

desk. I am positive in my mind that there must have been fully \$1400 of Mobile money in the drawer, which was brought from Mobile in my charge as clerk. The impression on my mind, as to the amount of the Mobile bank-bills, is drawn from my recollection of the cash balance on the former trip. I do not positively remember the entire cash balance which the books showed before leaving Mobile, but I think it was \$2,000, or more. When I speak of *current money*, I mean bills of the Bank of Mobile. It was my custom to examine all bills received, and to take such bills on the Bank of Mobile as were signed, 'W. R. Hallett, president,' and 'T. M. English, cashier.' I do not know anything about the dates or numbers of the bills. I do not say positively that they were so signed. I was well acquainted with the currency of the country, or, at least, thought myself so, and believed the bills spoken of to be genuine. No one but myself had access to the drawer; but, of course, I cannot say that no one took out the money."

The plaintiffs also introduced one Cavendish as a witness, who was the bar-keeper on the boat at the time of the fire, and who testified to the facts connected with the burning of the boat; "stating that the fire was very rapid, and the boat soon consumed, and was attended with great loss of life; and detailing circumstances which tended to show that, after the alarm of fire was given, no one had access to the clerk's office." They also proved their ownership of the boat at the time of its loss; that they had afterwards demanded payment of the lost bank-notes, and that the defendant refused to pay. This being substantially all the evidence adduced by the plaintiffs, "the defendant moved the court to exclude all said evidence from the jury, as being insufficient to authorize them, although they might believe it to be true, to find for the plaintiffs; which motion the court overruled."

"The court instructed the jury, upon the foregoing proof, that if they believed that the plaintiffs, at the time when said boat was burned, had and owned any sum consisting of bills issued by the Bank of Mobile, commonly called bank-notes, and were satisfied that such notes or

bills were destroyed by the fire,—then the plaintiffs would be authorized to recover in this suit the amount called for by said bills, with interest on the same from the time of notice and demand made and exhibition of the proof of loss.”

“The defendant excepted to this charge, and requested the court to instruct the jury, that no recovery at law could be had for the amount of any bill destroyed, unless the bill could be identified, either by the amount, date, number or description of it. The court refused so to charge, and instructed the jury, that if they were satisfied that the bills were burned, to any amount in value, a recovery could be had to the extent of the amount they believed from the proof was destroyed, although no further description or identification of them was given than that set forth in the deposition of Dulany. To this charge, as well as to the refusal of the charge asked, the defendant also excepted.”

The overruling of the demurrer to the complaint, the charges given by the court, and the refusal of the charge asked, are now assigned as error.

GEO. N. STEWART, and GEO. GOLDTHWAITE, for appellant.
THOS. H. HERNDON, *contra*.

A. J. WALKER, C. J.—One of the questions arising in this case is, whether section 2151 of the Code, which provides a remedy on certain instruments lost or destroyed, abrogates any pre-existing remedy. Our old statute, enacted in 1828, (Clay’s Digest, 382, § 9,) was not so essentially different from the latter statute as to afford any reason for a different decision of the question above stated under those two acts. It was decided by this court, that the act of 1828 “must be regarded as furnishing a cumulative remedy, and not as repealing or annulling all others, which were previously recognized at law.” *Branch Bank at Mobile v. Tillman*, 12 Ala. 214; *Posey & Coffee v. Decatur Bank*, 12 Ala. 802; *Bank v. Williams*, 13 Ala. 544.

The re-enactment in the Code of the act of 1828, in all

that concerns the question above stated, must be taken as a legislative adoption of the judicial construction, which it had received in reference to that question.—*Sartor v. Bank*, 29 Ala. 353; *Duramus v. Harrison & Whitman*, 26 Ala. 326. We therefore decide, that any common-law remedy, which would have been available to the plaintiff in this case, in the absence of a statute, is unaffected by any legislation in this State.

Section 2151 of the Code contains a clause in the following words: "But this section must not be so construed, as to *authorize* a suit for the recovery of a note or bill, issued by an incorporated bank to pass as money, and alleged to be lost or destroyed." This clause does not import an inhibition of all actions at law for the recovery of lost or destroyed bank-bills, nor can such inhibition be implied from its language. The natural effect of the language is merely to exclude the idea, that any action was authorized or given by that section; and a more extended meaning cannot be given to it, without a material addition to its legitimate import.

[2.] Where a bank-bill, which passes from hand to hand by delivery, is merely lost, an action at law cannot be maintained against the bank by the holder at the time of the loss, because the bills might be found and presented to the bank for payment. But this reason totally fails of any application, in the event of the utter destruction of the bills, or in any other contingency which renders a second payment by the bank impossible. The authorities fully sustain the proposition, that the liability of a bank to the holder of its bills is not extinguished by the destruction of the bills, which is but the evidence of the debt; and that after such destruction, an action at law may be maintained by the owner against the bank. In such case, the necessity of indemnifying the bank does not exist; and, consequently, there is no reason for driving the owner of the bills into chancery.—*Bank of Mobile v. Williams*, 13 Ala. 544; *Armat v. Union Bank of Georgetown*, reported in 16 Niles' Register, 360; *Patton v. Bank*, 2 N. & M. 464; *Bank of Louisville v. Simmons*, 14 B. Monroe, 306; *Housdale v. Bank of Orange*, 6 Wend. 378;

Wade v. New Orleans Can. and Bank. Co., 8 Rob. (La.) R. 140; Bullet v. Bank of Penn., 1 Wash. C. C. R. 172; Martin v. Bank of United States, 4 Wash. C. C. R. 253; Bank of United States v. Lill, 5 Conn. 106; Bank v. Aersten, 3 Scam. 135.

[3.] The omission of a description of the bills, as to their dates, in the first count of the declaration, was not a fatal deficiency. It is generally sufficient, in pleading, to aver that which is necessary to the plaintiff's recovery. Where the time at which a note falls due is dependent upon its date, it would be material to set forth with certainty the date. And it is necessary, in declaring upon a contract, to aver all that is necessary to give a correct idea of what the contract was, and to furnish the jury with a criterion for the assessment of the damages. 1 Chitty on Pleading, 255, 303. When, in this case, the complaint informs us that the contracts of the bank were fourteen several one-hundred-dollar bank-bills, made and issued by the defendant; that they were the property of the plaintiff, were destroyed by fire, and that a demand was made,—all that is requisite to the maintenance of the action is shown. Neither the right to a recovery, nor the amount of it, is dependent upon the date. The notes were payable upon demand, as we must judicially know, because they were bank-bills.

[4.] The question, as to the degree of certainty with which it is requisite that the destroyed bills should be identified, is new in this court; but the principles by which it is to be determined are of frequent application, and well recognized. This is simply a case where a recovery is sought, upon written contracts, which have been destroyed. The best evidence cannot be produced, and there is a resort to secondary evidence. It was incumbent upon the plaintiff to prove, that the bank-notes once existed. Of that fact slight evidence was sufficient.—1 Greenleaf on Ev. 558. And the proof in this case, on that point, certainly was sufficient. The loss was also proved, with much greater certainty than is usually deemed requisite in making out the proof preliminary to the introduction of parol evidence of the contents of the

destroyed papers. The question remains, then, was there the requisite proof of the contents? The proof discloses nothing more, with regard to the contents of the bills, than that they were of the issue of the Bank of Mobile, and altogether amounted to \$1400 at least. The witness does not state even the amounts of the several bills, which collectively made up the sum of fourteen hundred dollars; nor was he able to say positively by whom the bills were signed. This evidence is totally insufficient to prove the contents of the bills. Indeed, it amounts to no proof whatever of their contents. The rule as to the character of evidence requisite to establish the contents of a lost paper, laid down in a note to Greenleaf on Ev. § 558, is, "that the secondary evidence of its contents, or substance of the contents of its operative parts, must be clear and direct." In the case of *Tayloe v. Riggs*, 1 Peters, 600, Chief Justice Marshall said, when a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every suitor in court, who makes a claim which he cannot support.—See, also, *United States v. Button*, 2 Mason, 464; *Metcalf v. Van Benthuyssen*, 3 Comstock, 424; *Mariner v. Saunders*, 5 Gilman, 113; *Shorter v. Sheppard*, at the present term.

To hold the proof in this case sufficient to establish the contents of the lost papers, would not only be unauthorized by the books, but would, in effect, abrogate the rule requiring proof of the contents of lost papers.

The evidence of the contents of the lost papers being totally insufficient, the court erred in the charges given, because they authorized a verdict for the plaintiff, without proof of the contents of the lost papers; and there was also error in the refusal to charge as requested, for, if there was no identification of the notes in any way, there was no proof of their contents.

The judgment of the court below is reversed, and the cause remanded.

GAREY *vs.* MEAGHER & CO.

[ACTION AGAINST OWNERS OF STEAMBOAT FOR NEGLIGENCE.]

1. *Liability of steamboat-men for loss of cash-letter.*—Held, on the authority of *Hosea v. McCrory*, 12 Ala. 349, that the owners of a steamboat are responsible, as common carriers, for the loss of a cash-letter delivered to the clerk, if the evidence satisfies the jury that it is the general custom of steamboats to carry such letters, although they are delivered to the clerk, and are carried without charge or reward.
2. *Custom not proved by opinion of witnesses.*—A custom of trade, limiting the liability of the owners of a steamboat for cash-letters, cannot be established by the opinions of witnesses, to the effect that the clerk only is responsible.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. NAT. COOK.

THIS action was brought by the appellant, against the owners of the steamboat *William Jones, jr.*, to recover the sum of \$1550, with interest thereon, alleged to have been delivered to the defendants, in the city of Mobile, on the 23d December, 1853, to be delivered to Greenwood & Co., at Benton, in Lowndes county, and to have been lost by their negligence. The defendants pleaded, "1st, the general issue; and, 2dly, that the money was not delivered to them as alleged in the complaint."

"On the trial," as the bill of exceptions states, "the plaintiff introduced evidence tending to show, that the defendants were the owners of the steamboat *William Jones, jr.*; that on the 22d December, 1853, Messrs. Tarleton & Whiting, his factors in Mobile, enclosed \$1550 to him in a letter directed to Benton, Lowndes county, and handed it to the clerk of said boat, on board the boat, to be carried to Benton; that said letter was never delivered at Benton, nor to him, but was lost; also, that a large portion of the money transmitted up the country was sent by steamboat, but that it was carried without charge or reward. The defendants then introduced Mr. Whitaker, of the firm of St. John, Powers & Co., who testified, that

the house of which he was a member, sent large amounts of money by the boats; that nothing was ever paid for it; that he and his partners always considered that the clerk of the boat alone, to whom it was generally delivered, (if any one,) was responsible for its delivery, and not the owners of the boat; that the letters were carried as a favor, and for the accommodation of the public; that the boats could receive or reject such letters, as they pleased; and that he did not know what was the understanding of others. The plaintiff objected to this testimony, but the court allowed it to go to the jury; to which the plaintiff excepted.

“The defendants then introduced as witnesses six or eight commission-merchants, who testified, that money was frequently sent by the boats, but without charge or reward; that it was usually handed to the clerk, and no receipt for it was asked or given; that they considered the clerk alone responsible for its delivery, and not the owners of the boats; and that this, so far as they knew, was the general understanding, though some of them stated, that others engaged in the same business thought the boats were liable. To this testimony the plaintiff objected, and excepted to the overruling of his objection. The defendants then introduced as witnesses a number of steamboat-captains, who testified, that money in cash-letters had, for many years, been sent by their boats; that no charge was ever made for it, no compensation received, and no receipt given; that they did not consider the boat liable, unless it received pay, or gave a receipt for it; that it was not the business of the boat, and that they looked upon it as a favor done by the clerk for the accommodation of the public. To this testimony also the plaintiff objected, and reserved an exception to its admission by the court. These witnesses stated, on cross examination, that the question of the liability of the boats was raised five or six years ago, and there was a difference of opinion about it, in consequence of which, in November, 1853, most of the steamboats stuck up notices, stating that they would make specific charges for carrying cash-letters; that the defendants in this case, with others, did so; that

the idea was abandoned, in a week or two, in consequence of the opposition made to it, and no charge had ever since been made; that the carrying of cash-letters was not a part of their business, but was the mere act of the clerk; that they did not consider the boat liable; that the letters were handed to the clerk, and put in the iron safe of the boat; that the captain had nothing to do with them, and generally knew nothing of such letters being received; and that the clerk and the boat were subject to the authority of the captain. Some of them stated, that they did not think it would affect the business of the boats, if they were to refuse to permit the clerks thus to receive and carry such letters; but others stated, that if it was not general, it would probably give offense to some, and, for a time, have some influence on their business. The plaintiff then introduced two commission-merchants—Tarleton, the plaintiff's factor, and one William J. Ledyard—each of whom testified, that he had been engaged as a factor in Mobile for many years, did not know of any custom or usage that the clerk alone was considered responsible for the non-delivery of cash-letters, and had always considered the boat liable for their non-delivery. All the witnesses examined had been engaged for many years—say, from ten to twenty years—in sending cash-letters.

“The court charged the jury as follows: ‘If the proof shows that it is customary in Mobile, among factors, to transmit money to their customers in the interior through the hands of the clerks of the boats, enclosed in letters, to be delivered at the places designated; and that such letters are not carried as part of the business of the boats, and are not charged or receipted for in any manner as freight; and that the owners of the steamboats do not invite or solicit such business, but allow the same for the mere accommodation of the public; and that the money in this case was sent by the clerk of the boat, delivered to him by the plaintiff's factor, to be delivered to the warehouse-keeper at Benton, without charge, and without the knowledge of the owners, or any special promise from them to deliver it,—then, although the plaintiff may have

considered that, by ordering the money to be so sent, the owners of the boat would be liable, they would not be liable upon such evidence, and their verdict upon that state of facts should be for the defendants.'

"The plaintiff excepted to this charge, and requested the court to instruct the jury, '1st, that the evidence was not sufficient to establish the custom attempted to be proved;' and, '2dly, that the evidence does not prove that the plaintiff had notice of the custom, and that he is not bound by it, if established, unless he had notice of it;' each of which charges the court refused, and the plaintiff excepted."

The errors now assigned are, the rulings of the court on the evidence, the charge given by the court, and the refusal of the charges asked.

E. S. DARGAN, for the appellant.

THOS. H. HERNDON, *contra*.

STONE, J.—In the case of *Hosea v. McCrory*, 12 Ala. 349, it was submitted to the jury to determine, whether "it was the custom and usage for clerks (of steamboats) to carry (cash) letters;" and this court approved and affirmed a charge of the court in that case, which asserted that, "if the proof showed it was the custom and usage for clerks to carry letters, the clerk must be regarded as the agent of the master, and a delivery to the clerk was a delivery to the master." In commenting on this charge, our predecessors said, "this, we think, was a correct exposition of the law on this subject."

The case of *Hosea v. McCrory* was decided more than ten years ago; and the presumption must be indulged that, on the faith of that decision, many cash-letters have been remitted, per steamboat, to the interior. We do not feel at liberty now to depart from it.

In the record we are considering, the proof of the usage to send cash-letters to the interior by steamboats, is equally strong with that made in the case cited *supra*. The proof is alike in that case and this, that the transportation of cash-letters is no part of the regular business of steam-

boats—that no receipt is given for them, and no charge made for carrying them; and that such letters are delivered to the clerk, and by him kept and delivered.

Applying the principles stated *supra* to this case, it should have been left to the jury to say, whether it was the general usage of steamboats to carry cash-letters to the interior; and if the jury found such to be the case, then the principle would apply, that the act of receiving the letter by the clerk would become the act of receiving by the master and owners.

[2.] This record contains no evidence of a custom of trade, or of the river, limiting the liability of the defendants. It only contains the opinions of witnesses, that the clerk only, and not the master, is liable in a case like the present. To give this evidence the effect claimed, would be to allow the opinions of witnesses to overturn the decision pronounced in this court in the case of *Hosea v. McCrory*, *supra*.—See *Jewell v. Center & Co.*, 25 Ala. Rep. 498.

The charge given by the court, and the charges asked and refused, are in conflict with this opinion.

Judgment of the circuit court reversed, and cause remanded.

BURDINE vs. MUSTIN.

[MOTION TO DISMISS APPEAL.]

1. *Implied waiver of defective appeal bond.*—The filing of a brief by the appellee's attorney, in which he discusses the merits of the case, and, at the same time, insists that the appeal ought to be dismissed, is not equivalent to a joinder in error, nor is it an implied waiver of defects in the appeal bond.
2. *Sufficiency of appeal bond in description of judgment.*—If an appeal bond describes the judgment as having been rendered against the appellant and her husband, when the record shows that it was rendered against her alone, the appeal will be dismissed on motion.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. WILLIAM S. MUDD.

THIS action was brought by William G. Mustin, against James T. Burdine, and Mary, his wife, and was commenced in a justice's court. The justice having rendered judgment against the defendants, Mrs. Burdine appealed to the circuit court, and executed an appeal bond, without joining her husband. In the circuit court, the plaintiff and Mrs. Burdine only appeared; and that court rendered judgment, dismissing the appeal at the costs of Mrs. Burdine and her sureties. From this judgment Mrs. Burdine sued out an appeal, and executed an appeal bond, wherein the judgment is described as having been rendered "in a cause between William G. Mustin, as plaintiff, and James T. Burdine and his wife, Mary, as defendants." On these facts, the appellee's counsel submitted a motion to dismiss the appeal, on account of the insufficiency of the appeal bond; which motion was resisted by the appellant's counsel, on the ground that the motion came too late.

ALEX. B. CLITHERALL, for the motion.

TURNER REAVIS, *contra*.

R. W. WALKER, J.—The fact that an attorney has filed a brief, in which he discusses the merits of the case, and, at the same time, insists that the appeal ought to be dismissed, as not having been properly taken, cannot be considered as equivalent to a joinder in error, or as a waiver of defects in the appeal bond.

[2.] The appeal in this case falls completely within the rule settled in *Dumas v. Hunter*, 28 Ala. 688; and, upon the authority of that case, must be dismissed.

HENLEY vs. BUSH.

[ACTION FOR BREACH OF SPECIAL CONTRACT.]

1. *Effect of demurrer to plea.*—Under section 2253 of the Code, which requires a specification of the grounds of demurrer, a demurrer to a plea cannot be visited upon the complaint.
2. *Who is proper party plaintiff.*—Section 2129 of the Code does not apply to a written contract, by which defendant acknowledged his receipt of his own note, payable to a third person or order, and promised to return or account for it to the person from whom he received it; but such receipt having been endorsed in blank by the promisee to the payee of the note, and afterwards transferred by delivery by the latter to plaintiff, the legal title vests in the plaintiff by virtue of section 1530 of the Code, and he may maintain an action on the contract in his own name.
3. *Time of performance of contract.*—When no time is specified for the performance of a written contract, by which defendant, acknowledging his receipt of his own note, payable to a third person, promised to return or account for it to the person from whom he received it, the legal presumption is, that the parties intended its performance within a reasonable time; and an action may be maintained for a breach after the lapse of six years.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. S. D. HALE.

THE amended complaint in this case was as follows:

“Albert T. Henley } The plaintiff also claims of the
 vs. } defendant \$1000, for the breach of an
 Edmund T. Bush. { agreement in writing, entered into by
 him on the 20th November, 1847, in said county, by which
 he promised one John Robinson to return to him, or to
 account for, a note for \$468 63, given by him to W. A.
 Scott, due on the 17th March, 1847; which note said
 defendant received from said Robinson, on said 20th
 November, 1847, at the time he made said written agree-
 ment; which written agreement the said John Robinson
 endorsed in blank to said W. A. Scott, who, before the
 commencement of this suit, delivered the same, with said
 blank endorsement thereon, to the plaintiff. The breach
 of said agreement complained of is, that said defendant
 has never returned said note to said John Robinson, nor

accounted to him for it; nor has he returned said note to said W. A. Scott, or accounted to him for it; nor has he returned said note to said plaintiff, or accounted to him for it."

To the amended complaint the defendant filed a plea, which was sworn to, in these words: "For answer," &c., "the defendant says, that the said agreement in writing, in said amended complaint mentioned, is a receipt, made by said defendant on the 20th November, 1847, by which defendant acknowledged to have received from said Robinson his (defendant's) note for \$468 63, due March 17, 1847, payable to William A. Scott or order; by which receipt, defendant agreed to return said note to said Robinson, or to account to him for the same. And said defendant further saith, that before notice that said note had been transferred by said Scott to said Robinson, said Scott was justly indebted to said defendant in the sum of \$1000, for so much money paid by the said defendant, before that time, to and for the use of said Scott, and at his request; that when said note was presented to him by said Robinson, to-wit, on the day said receipt bears date, defendant informed said Robinson that he had a set-off against said note, and that said Scott was indebted to him as aforesaid; that said Robinson thereupon delivered said note to him, and received said receipt from him; that afterwards, to-wit, on the — day of —, 1848, said Robinson wrote his name across the back of said receipt, and delivered said receipt to said Scott; that thereupon said Scott then and there paid said Robinson, and settled with him for the consideration for which he had before then transferred said note to said Robinson; that afterwards, to-wit, on the — day of —, said Scott transferred said receipt to said plaintiff, by delivering the same to him, with the name of said Robinson so written across the back thereof; and said defendant avers, that said Robinson did not assign said receipt to plaintiff, as he in his said complaint doth allege. And said defendant further saith, that he is ready and willing, and hereby offers, to set off against the claim of said plaintiff so much of said sum that said Scott is indebted to him as aforesaid, as

may be necessary to satisfy and discharge said note of defendant in said receipt named; and defendant brings said note here into court, and avers that he is now, and ever has been, ready and willing to account for said note, and was so ready before the action in this behalf was brought."

The plaintiff demurred to this plea, and assigned the following causes of demurrer: "1st, that said plea does not show a sufficient excuse for the breach complained of in the amended complaint; 2d, that said plea does not present a bar to the action alleged in said amended complaint; 3d, that said plea shows no sufficient excuse for the failure to return or account for the note mentioned in said amended complaint; 4th, that said plea is a plea of set-off to an action sounding in damages merely; and, 5th, that said plea is double, in that it sets up a set-off as a bar, and at the same time denies the assignment of the receipt which is the foundation of the action." On the argument of this demurrer, the court held the amended complaint insufficient, and visited the demurrer upon it; and, on the plaintiff declining to amend, rendered judgment for the defendant.

The errors now assigned are, the overruling of the demurrer to the plea, the visiting of the demurrer to the plea upon the complaint, and the rendition of judgment for the defendant.

TURNER REAVIS, and H. S. SHELTON, for appellant.—The complaint conforms substantially to the form given on page 553 of the Code, and is sufficient. See, also, section 2227. It was not necessary to allege a request of the defendant to return or account for the note. The contract imposed on him the duty of returning or accounting for the note, within a reasonable time, of his own accord. 2 Parsons on Contracts, 173; Adams v. Adams, 26 Ala. 272; Calvert v. Marlow, 18 Ala. 67; 1 Chitty's Pleadings, 329-30, and notes; 1 Saunders' Pl. and Ev. 130-31. But, if it were necessary to allege a request, the omission to do so could only be taken advantage of by special demurrer, (1 Chitty's Pleadings, 331;) and the court will not

extend a demurrer to a plea to such a defect in the complaint.—1 Chitty's Pleadings, 668 *a*, top.

The receipt was assignable, both under the act of 1828, and under the Code; and having been endorsed by the obligee in blank, and delivered by a subsequent holder to the plaintiff, the latter had a right to sue upon it in his own name.—Clay's Digest, 383, § 12; Code, § 1530.

But, if the complaint were never so defective, the defects could not be reached in this indirect way. The defendant himself should have demurred, and assigned causes.—Code, §§ 2253, 2405.

The plea is bad, for the reasons assigned in the demurrer.—Morrow v. Campbell, 7 Porter, 41; 1 Chitty's Pleadings, 338, mar.; 2 Parsons on Contracts, 492-3; Code, § 2240; Brown v. Chambers, 12 Ala. 698; George v. Cahaba, &c., 8 Ala. 234; Cole v. Justice, 8 Ala. 793; 1 Chitty's Pleadings, 532, mar.

E. W. PECK, *contra*.—1. The complaint is bad, because it does not aver a sufficient breach of the agreement. The defendant was a mere bailee of the note, and was bound by his contract to return it to Robinson, not within a reasonable time, but on request, or demand; and it was therefore necessary, in seeking to charge him for a breach, to aver a refusal to return the note on demand.—Story on Contracts, § 974; Bach v. Owen, 5 T. R. 216; 1 Chitty's Pleadings, 330, 668, note; 28 Ala. 618; Story on Bailments, §§ 41, 107.

2. The complaint is defective for the additional reason, that it shows no cause of action in the plaintiff. The action should have been brought in the name of Scott, for the use of the plaintiff. The contract declared on, not being "for the payment of money," does not fall within section 2129 of the Code; nor can the action be sustained under section 1530, because the complaint does not allege an endorsement to the plaintiff.

8. The complaint being bad, the demurrer to the plea was properly visited on it. The established rule of pleading, which requires a demurrer to be visited on the first substantial fault in pleading, is not abrogated or

affected by any provision of the Code. Section 2253 of the Code only confines the party demurring to the objections specified in his demurrer, but does not in any manner affect the other rule, which imposed the duty on the court, *ex mero motu*, of giving judgment on the demurrer against the party who was guilty of the first substantial defect. If the complaint is substantially defective, the defendant may either demur, move in arrest of judgment, or assign error. No injury is caused to the plaintiff by allowing the demurrer to extend back to the complaint, nor is he deprived of the opportunity to amend.

4. The plea presented a good defense to the action. The defendant had a good set-off before the note was transferred to Robinson; and giving the receipt, under the circumstances, did not deprive him of it.

A. J. WALKER, C. J.—The court below erred in visiting the plaintiff's demurrer to the defendant's plea upon the complaint. Until the Code was adopted, it was "an established rule, that upon the argument of a demurrer, the court would, notwithstanding the defect in the pleading demurred to, give judgment against the party whose pleading was first defective in substance.—1 Chitty on Pl. 668. That rule is abolished in this State by section 2253 of the Code, which is in the following words: "No demurrer in pleading can be allowed, but to matter of substance, which the party demurring specifies; and no objection can be taken or allowed, which is not distinctly stated in the demurrer." An analysis of this law discloses, that a demurrer can only be *for matter of substance*; that the matter of substance must be *specified in the demurrer by the party demurring*; and that no objection can be taken or allowed without a distinct statement of it, which must be in the demurrer. If the court carries the plaintiff's demurrer to the plea back upon his own complaint, the statute will be violated. The defendant would have the benefit of a demurrer, when he was not the party demurring, and when he did not specify any matter of substance, as to which the complaint was defective; and an objection would be taken and allowed, which was

not distinctly stated in a demurrer. Everything prohibited by the statute would be done.

We have in the Code not merely an abolition of general demurrers, and a substitution of special demurrers; but we have, in addition thereto, an express prohibition of the making or allowing of any objection not stated in the demurrer. This prohibition was useless, if nothing more than the adoption of special demurrers was intended. That is accomplished by the first clause of the section quoted. Not stopping with the mere requisition of special demurrers, the law has prescribed a special demurrer as the mode of making objections for substantial defects in pleadings. It would be difficult to find anything more appropriate for the operation of this superadded mandate of the law, than the rule of making a party's demurrer the occasion of defeating his own pleading.

The object of the legislature was to prevent surprise, and to protect parties from injury in consequence of errors in pleading not made known until the time for amendment had passed. If a demurrer to the plea can be visited upon the complaint, judgments may be affirmed and reversed in this court, on account of deficiencies in the complaint, which may never have been detected by the counsel on either side, until the cause was examined on appeal, when it would be too late to amend. It seems clear, therefore, that the visitation of demurrers upon the pleadings, antecedent to that in terms objected to, is within the mischief intended to be remedied, and therefore within the spirit of the law. A visitation of a demurrer upon antecedent pleadings, can only have the effect of a general demurrer. *Cook v. Graham*, 3 Cranch, 265. The privilege and benefits of a general demurrer cannot be conceded to a party since the Code, without a violation of its spirit. See *Johnson v. Stebbins*, 5 Ind. R. 364.

The judgment of the court below must be reversed, for the error in visiting the demurrer to the plea upon the complaint. Nevertheless, we shall decide upon the sufficiency of the complaint, for the question will probably

be raised in the proper manner by the defendant, when the case returns to the circuit court.

[2.] The complaint is upon a written promise by the defendant to return or account for a certain note to one Robinson. Robinson endorsed the writing, "in blank, to W. A. Scott," who delivered it without any new endorsement to the plaintiff. Can the plaintiff maintain a suit upon the written contract in his own name? He cannot sue, because he is the party really interested, upon an equitable title; for he sues upon a contract for the performance of one or the other of two acts, and not on "a promissory note, bond, or other contract, express or implied, for the payment of money."—Code, § 2129. If, then, the plaintiff can maintain the suit in his name, it is because he has the legal title. According to the common law, he has no legal right, for it did not permit the transfer of the legal title to choses in action such as that sued upon. But the argument for the appellant is, that he has the legal title by virtue of section 1530 of the Code. That section does establish the assignability of the instrument described in the complaint, and it also prescribes endorsement as the mode of assignment. The plaintiff received the writing by delivery, not by an endorsement directly to him. But it is said, that the blank endorsement was a transfer by endorsement to any subsequent holder of the instrument; that the subsequent holder had a right to fill up the blank endorsement with his name, and that therefore the blank endorsement may be treated as an endorsement to him. Such, we think, is the law. *Agee & Agee v. Matlock*, 25 Ala. 281; *Story on Bills*, § 207; *Chitty on Bills*, 255. A delivery of the instrument to the plaintiff was, *prima facie*, an authority to him to act as the endorsee, and to fill up the blank endorsement with his name.

[3.] We are also of the opinion, that after the lapse of a reasonable time for the return or accounting for the note mentioned in the instrument sued upon, the plaintiff had a right of action; and that in this case, such reasonable time did elapse before the commencement of the suit.—*Garnett v. Yoe*, 17 Ala. 74; *Skinner v. Bedell's*

Adm'r, 32 Ala. 44. We hold that the amended complaint was sufficient.

The foregoing opinion covers all the questions passed upon in the court below. For that reason, and because the same questions now presented by the other pleading may not again arise, we forbear to decide any of the other questions argued the counsel.—Sibley v. Bondurant, 29 Ala. 570; Byrd v. McDaniel, 26 Ala. 582.

The judgment of the court below is reversed, and the cause remanded.

GREEN vs. BRANCH BANK AT MONTGOMERY.

[TRIAL OF RIGHT OF PROPERTY IN SLAVE.]

1. *Validity of trust deed.*—A deed of trust, executed before the adoption of the Code, by which a debtor conveyed all his property to a trustee, in trust for the payment of his debts and the support of his wife and children, is not fraudulent on its face as against creditors; the provision for the payment of debts not being vitiated by the provision for the benefit of the grantor's family.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. C. W. RAPIER.

THIS was a trial of the right of property in a slave named Frank, between the Branch Bank at Montgomery, plaintiff in execution against Warren Green, and said Green as claimant, under his appointment by the chancery court as trustee in a deed hereinafter mentioned. The plaintiff's judgment was rendered at the spring term, 1842, of the circuit court of Montgomery; and was founded on the defendant's promissory note for \$300, dated April 1, 1840, and payable ninety days after date. The execution on this judgment, under which the levy was made, was issued on the 1st February, 1856, and levied on the 26th March next following. The deed

under which the claimant derived title, was executed by himself on the 25th October, 1841, was attested by two witnesses, and was in the following words :

“State of Alabama, } Know all men by these presents,
Pike County. } that I, Warren Green, of said
county, in consideration of my desire to make provision
for my just creditors, and for my wife and children, as
also in consideration of the sum of one dollar to me in
hand paid by Henchey Green, of the county of Barbour,
do hereby bargain, sell, enfeoff, deliver and convey to said
Henchey Green, all the lands and tenements, to-wit,”
(describing them,) “also, the following personal property,
to-wit, slave Lucy, a woman aged about thirty years,
Kate, a girl about twelve years old, *Frank*, a boy about
ten years old, Isaac, a boy about eight years old, Ben, a
boy about six years old, Alice, a girl about three years
old, Jacob, a boy about two years old, and Winny, a
girl about three months old, all children of said Lucy;
also, Dorcas, a woman aged about twenty-five years,
and her children, to-wit, Ned, aged about ten years,
and Milly, a girl about four years old; also, Sarah, a girl
aged about twelve years; also, stock, to-wit, all my stock
of cattle, being about one hundred and fifty head, sixty
head of hogs, nine head of sheep, nine head of goats, six
head of horses; also, this other personal property, to-wit,
one road-wagon, one Jersey-wagon, one clock, four beds
and furniture, now at my residence, as also all other prop-
erty, whether lands, goods, or choses in action, I may now
own, or be in any manner entitled to; to have and to hold
all and singular the lands, slaves, personalty, and choses
aforesaid, to him, the said Henchey Green, his heirs,
executors, administrators and assigns, absolutely, in fee-
simple, forever; in trust, however, for the sole use and
benefit of said creditors, wife and children; and all or
any part of said property, both real and personal, the said
Henchey may bargain, sell and deliver, as necessity
may require, to pay any just debt I may now owe, or
liability I may now be under; and the said Henchey, his
heirs or assigns, may bargain, sell and deliver all or any
of said property for the payment of my present debts and

liabilities, as also to enable the family to remove, in case they desire to do so, and also to pay such debts as may be hereafter created for the necessary expenses of my said wife and children. In testimony whereof," &c.

On the trial, as appears from the bill of exceptions, the plaintiff proved the rendition of its judgment, the note on which it was founded, the issue of the execution, its levy on the slave in controversy while in the defendant's possession, and the value of the slave. The claimant then read in evidence the deed of trust above copied, and introduced testimony tending to show, that the slave in controversy was one of those conveyed by said deed of trust; that the trustee named in the deed had died, and that he had been appointed trustee in his stead by the chancery court.

"The court charged the jury, among other things, that if Warren Green, before and at the time of the execution of said deed of trust, was indebted to the plaintiff, then said deed was void as against the plaintiff, and said Green's title to the property therein mentioned was not divested, so as to prevent it from being liable to an execution in favor of the plaintiff on such indebtedness.

"To this charge the claimant excepted, and then requested the court to instruct the jury as follows :

"1. That if the deed of trust conveys all the property of the maker, and makes a provision for all his just and subsisting debts, the deed is not void as to creditors, and the property conveyed is not liable to an execution at law.'

"2. That if they believe from the evidence that the deed of trust conveys all the property of the maker, and makes a provision for all his just and subsisting debts, the proper remedy for creditors is in a court of chancery, and not in a court of law.'

"The court refused each of these charges, and to each refusal the claimant excepted;" and he now assigns as error the charge given, and the refusal of the charges asked.

E. S. DARGAN, and JNO. T. TAYLOR, for the appellant.

S. J. CUMMING, *contra*.

STONE, J.—The bill of exceptions in this case does not assume to set out all the evidence. It does not inform us whether the deed of trust was delivered, or whether the trust deed was ever recorded. Perhaps, if either of these essentials were shown to have been omitted, it would be fatal to the claim interposed in this case.

The affirmative charge, however, does not rest on either of the grounds above stated. It pronounced the deed fraudulent in law, and void on its face, as against creditors of the graator, to whom he was indebted when he executed the trust deed. The debts sought to be collected in this proceeding had been incurred before the deed was executed; and under the charge, the jury had no discretion, but were bound to find the property subject, although the deed may have been duly delivered and recorded. It will be observed that the deed in this case was executed in 1841, and hence it is not governed by the Code, § 1550.

In *Riggs v. Murray*, 2d Johns. Ch. 565, insolvent debtors conveyed all their property in trust, to pay, 1st, the expenses of the trust; 2d, a sum not exceeding \$2000 per annum for each of the grantors, (four in number,) towards their support, until they should be respectively discharged from their debts, &c.; 3d, to pay certain creditors named; 4th, to pay themselves (the trustees) certain specified debts; and, 5th, to pay other debts," &c. Chancellor Kent, in considering that part of this assignment which reserves a part of the fund to the support of the grantors, said: "A reservation of a part of the interest to himself, does not destroy the provision in respect to the residue; though, if the part unreserved be deficient, the creditors might, perhaps, apply to a court of equity for the residue."

This case was taken to the court of errors; and the opinion of the chancellor, expressed above, was affirmed. 15 John. 571.

In *Anderson v. Hooks*, 9 Ala. 704, this court said,— "Although a deed may be void in part, by a statute, yet it will be valid for the residue, unless the statute avoids it for all purposes. The statute of frauds merely declares,

that the gift, grant or conveyance, if made with the intent or purpose to defraud creditors, is clearly and utterly void. Now, a single deed may evidence a gift, grant or conveyance to different individuals, and of distinct objects, and may be invalid as to one of the grantors, without affecting the others." See, also, Mackie v. Cairns, 5 Cowen, 547; Estwick v. Cailland, 5 T. R. 420; Tarbock v. Marbury, 2 Verm. 510; Taylor v. Branch Bank at Huntsville, 21 Ala. 581.

The above authorities, it seems to us, are conclusive to show, that the provision in the deed for the payment of all the grantor's just debts, is not necessarily avoided by the other provision for the support of the grantor's family.

It results from what we have said, that the court erred in the affirmative charge given.

Each of the charges asked by the claimant, and refused by the court, is essentially defective in this, that each ignores the *bona fides* of the trust deed. If these charges are in other respects unexceptionable, they were rightly refused, because they do not refer to the jury the question of the good faith of the deed of trust.

If it shall be shown that the deed was executed and delivered, and was recorded as required by law; and the jury, under appropriate charges, shall not find that the deed was executed to delay, hinder or defraud creditors, then the law does not pronounce it fraudulent.

For the single error in giving the affirmative charge, the judgment of the circuit court is reversed, and the cause remanded.

SHORTER *vs.* SHEPPARD.

[BILL IN EQUITY TO QUIET TITLES TO LAND.]

1. *Predicate for secondary evidence of deed.*—The grantee being presumed to have the custody of a deed, the fact that he fled from the State, eight or nine years ago, as a fugitive from justice, and has not since been heard of, is a sufficient excuse for the non-production of the deed by one claiming under a purchase at execution sale against him.
2. *Secondary evidence of execution and contents of lost deed.*—The oral admissions of the grantee, as detailed by witnesses twelve or thirteen years after they were made, to the effect “that he had given up the property, the times being hard, and he being unable to make his payments;” “that he had given all the lands back to his uncle,” the grantor; “that he had parted with all the rights he had to the lands, and to his uncle;” and “that he had re-conveyed all the lands back to his uncle,”—held insufficient, under all the circumstances of the case, to establish the execution and contents of a re-conveyance of the lands.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by John Gill Shorter, against Edmund Sheppard, in his own right, and as administrator of George W. Lore, deceased, and the infant heirs-at-law of said Lore. Its object was to quiet the complainant's title to a large tract of land lying in Barbour county, and several town-lots in Eufaula, which are particularly described in the bill; and to enjoin the defendant Sheppard from proceeding, under an order of the orphans' court, to sell the interest therein which he claimed as belonging to the estate of his intestate, and from instituting threatened actions at law for the recovery of the interest which he claimed in his own right. The claimant derived title to the land under purchases at sheriff's sale, made in 1843, 1844, and 1845, under sundry executions issued on judgments against one Seth Lore; and a purchase under a decree in chancery, in October, 1846, which was rendered in a suit instituted by the Branch Bank at Montgomery against said Seth Lore; while the defendants asserted title under deeds from said

Seth Lore, dated the 18th May, 1838, by which he conveyed said lands and town-lots to said George W. Lore and Edmund Sheppard jointly. The bill alleged that these deeds, which were duly recorded, were not *bona fide* and absolute, but were intended simply as a power of attorney to enable the grantees to sell and convey, under an agreement between them and the grantor, to the effect that the proceeds of sale, over and above the aggregate amount specified as the consideration of the deeds, should be paid over to the grantor; and that the grantees, in the year 1841, by separate deeds, re-conveyed all the lands and lots to said Seth Lore. The re-conveyance from Sheppard to Seth Lore, dated the 25th October, 1841, was duly recorded in the proper office in Barbour county, and no question is made in this court respecting it. The re-conveyance from George W. to Seth Lore, which was never recorded, was alleged in the bill to be lost, or to have been carried off by said Seth Lore when he fled to parts unknown; and the only matter of controversy in this court, by agreement of record between the counsel of the respective parties, was, whether this re-conveyance was established by legal evidence. The material facts disclosed by the record, bearing on this point, are briefly these:

Seth Lore removed from Philadelphia, where he left his family, and settled in Barbour county, Alabama, where he engaged in land-speculations. George W. Lore was his nephew, brought out by him from New Jersey, and alleged in the bill to be without means or property of any kind. In the spring of 1841, Geo. W. Lore was arrested in Barbour county, for the murder of one Blake, but was discharged on bail; remaining in Eufaula for five or six weeks, and going to Philadelphia on a visit. After his return from the north, having been given up by his bail, he was confined for some time in the county jail, from which he succeeded in effecting his escape; but being caught, in the fall of 1842, in the vicinity of the murder, he was seized by a mob of the citizens, and summarily executed. In the spring of 1842, Seth Lore was indicted, in the circuit court of Barbour, for perjury; and

to escape the prosecution, absconded from the State, and fled to parts unknown. The bill alleged, that the arrest and confinement of George W. Lore, as above stated, "mainly conduced to the withdrawal of said power of attorney from him and said Sheppard, and likewise prevented them from joining in one re-conveyance at one and the same time;" that Seth Lore, after the execution of the two re-conveyances to him, took possession of the lands and lots, and assumed the entire control and management thereof; that on the 6th November, 1841, he executed a mortgage on all the property, to secure a pretended debt of \$17,000 alleged to be due to one William Lore, of Philadelphia, who was his brother; that this mortgage was held fraudulent and void by the chancery court, in the suit above referred to as having been instituted by the Branch Bank at Montgomery, and a decree was rendered for the sale of the lands, which were purchased at the sale, as above stated, by the complainant; and that Seth Lore, when he fled from the country to escape the prosecution for perjury, carried with him all the deeds and muniments of title appertaining to the lands.

To prove the execution and contents of the re-conveyance from George W. to Seth Lore, the complainant took the depositions of George L. Barry, David Lore, and W. S. Paullin. In relation to said re-conveyance, Barry testified as follow: "In the year 1841, George Lore told witness that he had re-conveyed all the land back to his uncle; but he does not recollect whether he stated when the re-conveyance was made; witness never saw the re-conveyance, and does not know where it is." David Lore testified as follows: "Witness understood from George Lore, that he and Sheppard had given up the land and lots, and had re-conveyed the property to Seth Lore; that the times had got hard, and he was unable to make the payments. Witness does not recollect whether he said a deed was made or not, nor whether he said he had got back his notes or not, nor whether he used the word *re-conveyed* or not." (On cross-examination.) "Witness never heard George Lore say he had made any

re-conveyance in writing, nor anything about a writing: his exact words were, that he had given up the property, the times being hard, and he being unable to make his payments." Paullin testified as follows: "George and Seth Lore conversed together in presence of witness, and both told him that Seth had taken the lands back. Witness understood George, in conversations had with him, to say that he had given all the lauds back to Seth; can't recollect whether he said he had conveyed or given them back; but the substance of what he said was, that he had parted with all the rights he had to the lands, and to Seth Lore. What witness says, about George giving up the property to Seth, is not a mere impression or conclusion of his from what George said; but George used some expression which witness cannot recollect, but which, in substance, admitted a rescission of the trade, and a re-conveyance of the lands to Seth Lore."

On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

CHILTON, MORGAN & CHILTON, for appellant.—1. The predicate for the introduction of secondary evidence is sufficiently laid.—*Scott v. Rivers*, 1 Stew. & P. 19; *Mordecai v. Beale*, 8 Porter, 536; *Minor v. Tillotson*, 7 Peters, 99; *United States v. Rayburn*, 6 Peters, 352; *Bailey v. Johnson*, 9 Cowen, 115; *Mauri v. Heffernan*, 13 Johns. 58; *Quinn v. Rippey*, 4 Ired. Eq. 181; *Jackson v. Vail*, 7 Wendell, 125; *Allen's Lessee v. Parish*, 3 Ohio, 107, 122; *Renner v. Bank of Columbia*, 9 Wheaton, 596; *Edgar's Lessee v. Robinson*, 4 Dallas, 132; *Bassler v. Niesser*, 2 Serg. & R. 352; *McDonald v. Campbell*, 2 Serg. & R. 473; *Clark v. Van Kirk*, 14 Serg. & R. 354; *Fetherly v. Waggoner*, 11 Wendell, 599; 2 Metcalf, 363; *Belton v. Briggs*, 4 Dess. 475; *Ashmore v. Hardy*, 7 Car. & P. 501; *Nolen v. Gwinn's Heirs*, 16 Ala. 725; *Bishop's Heirs v. Hampton*, 19 Ala. 792; *Corbin v. Jackson*, 14 Wend. 619; 3 Rawle, 437; *Riggs v. Tayloe*, 9 Wheaton, 483; 5 Peters, 233; 9 Vermont, 334. Most of these cases also show, that the statute of frauds did not change

the general rules of evidence, and that it has nothing to do with the case where a written conveyance is proved to have been executed.

2. The admissions of George W. Lore, under the circumstances disclosed by the record, are sufficient evidence, as against his heirs and administrator, of the execution, delivery and contents of the re-conveyance by him to Seth Lore.—1 Greenl. Ev. (5th ed.) §§ 96–97; Doe v. Watson, 2 Starkie, 230; Digby v. Steele, 3 Camp. 115; Sewell v. Stubbs, 1 Car. & P. 73; 1 Starkie, 181; 2 Camp. 188; 4 Camp. 375; Barker v. Ray, 2 Russ. 67; 6 Mees. & W. 664, and notes; Hodges v. Hodges, 2 Cushing, 455; 7 J. J. Mar. 445; Corbin v. Jackson, 14 Wendell, 619; McDonald v. Campbell, 2 Serg. & R. 474; Adam v. Kerr, 1 Bos. & Pul. 360; Allen's Lessee v. Parish, 3 Ohio, 122; 4 Bibb, 364; 4 East, 54; 6 Hill, 303; 2 Wendell, 575; Adams v. Shelby, 10 Ala. 483; 3 Bing. N. C. 29; 1 Nott & McC. 226; 4 Dallas, 132.

E. C. BULLOCK, with ELMORE & YANCEY, *contra*.—There is no proof that a re-conveyance from George W. to Seth Lore ever existed, or that it was legally executed, or what its contents were. If the existence and loss of the deed had been established, the complainant would still have been held to as strict proof of its execution as if it had been produced.—Stone v. Thomas, 12 Penn. 209; Kelsey v. Hamner, 18 Conn. 311; Elmendorf v. Carmichael, 3 Litt. 472; Rhodes v. Siebert, 2 Barr, 18; 3 Wharton, 424; 6 Watts, 228; 4 Greenl. Rep. 368; 2 Starkie, 528; 31 Maine, 510; 25 Maine, 90; 3 Stew. & P. 227. The only evidence adduced of the existence, execution, and contents of the deed, consists of parol admissions of the grantor, made in casual conversations, and detailed by the witnesses after the lapse of twelve years. Such admissions, even if competent evidence, are totally insufficient.—Morgan v. Patrick, 7 Ala. Rep. 185; Lands v. Crocker, 3 Brevard, 40; Fox v. Reil, 3 Johnson 477; 3 Scammon, 532; Barnard v. Pope, 14 Mass. 434; Welland Canal Co. v. Hathaway, 8 Wendell, 480; Jenner v. Joliffe, 6 Johns. 22; Hasbrouck v. Baker, 10 Johns. 248;

Jackson v. Miller, 6 Cowen, 751; Jackson v. Vosburgh, 7 Johns. 186; 2 Root, 199; 6 Barr, 59; 2 Southard, 115, 501.

R. W. WALKER, J.—By the agreement of the counsel in this case, our investigation is confined to a single question—namely, whether there is legal proof sufficient to establish a re-conveyance of the land in controversy, by George W. Lore to Seth Lore, re-investing the latter with the title previously conveyed by him to the former.

Ordinarily, the mode of establishing such a re-conveyance would be the production of the deed, and proof of its execution. In this case, no deed was produced; and this devolved upon the complainant the necessity of proving the existence of such an instrument, of satisfactorily accounting for its absence, and of showing its contents. Inasmuch as the deed, if there was any, was made to Seth Lore, the law presumes that it passed into his possession, and remained in his custody. Seth Lore left this State in 1842, or 1843, as a fugitive from justice, and has not since been heard of. These facts, we think, constitute a sufficient excuse for the non-production of the deed.—1 Greenl. Ev. § 558; 4 Phill. Ev. (C. & H.'s ed.) pp. 405–12–13; Cheatham v. Riddle, 8 Texas, 162.

The complainant, however, must not only account for the absence of the deed, but he must also clearly prove its existence as a genuine instrument.—Rhodes v. Seibert, 2 Barr, 18; Kelly v. Hamner, 18 Conn. 317; Young v. Mackall, 4 Md. 362; Mariner v. Sanders, 5 Gilman, 121.

If he succeeds in making this preliminary proof, then he will be permitted to show by parol the contents of the deed. But the evidence of such contents must be pointed and clear: no vague or uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself; and Thompson, J., in Renner v. Bank of Columbia, 9 Wheat. 581, 700, goes so far as to say, that the proof must be so distinct “as to leave no reasonable doubt as to the substantial parts of the paper.” Inasmuch as the statute of frauds requires that the conveyance of lands shall be by writing, and makes the writing,

when it can be produced, the only legal evidence of the conveyance, common reason would seem to dictate that, in cases where the written instrument is lost or absent, the proof of its contents should be clear and satisfactory, and such as to secure, as far as possible, the safety designed to be given by the written evidence.—United States v. Brittan, 2 Mason, 468; Tayloe v. Riggs, 1 Peters, 600; Metcalf v. Benthuyssen, 3 Comst. 427; McBurney v. Cutler, 18 Barb. 203; *In re Gangwere*, 2 Harris, 426; Mariner v. Sanders, 5 Gilman, 121; Dennis v. Barber, 6 Serg. & R. 425; 1 Greenl. Ev. § 558, and notes.

In this case, neither the existence, nor the contents of the deed, is attempted to be proved otherwise than by the oral admissions of George W. Lore; and the *same* admissions are relied upon for the double purpose of establishing at once the execution and the contents of the deed. The counsel for the appellant, it is true, contend that these admissions are corroborated by some other circumstances, such as the relationship of the parties, their comparative pecuniary condition, and the evidence introduced for the purpose of showing a resumption by Seth Lore, about the time when the re-conveyance is supposed to have been made, of some of the lands in controversy; and in determining the weight to which these declarations are entitled, we have given them the benefit of all the support which we think they ought to derive from these attendant circumstances.

The admissions are proved by David Lore, William S. Paullin, and George L. Barry, whose depositions were all taken in the month of June, 1853. The declarations of George W. Lore, as detailed by these witnesses, were, in substance, "that he had given the property up, the times being hard, and he being unable to make his payments;" "that he had given all the lands back to Seth Lore;" "that he had parted with all the rights he had to the land, and to Seth Lore;" "that he had re-conveyed all the land back to his uncle." It is proper to observe, that the witness who puts the admission in the form last quoted, states that he was the purchaser of some of the lots at the sales made by the sheriff and master under execu-

tions against Seth Lore, and that he has sold all, or nearly all, of the lots so purchased by him; giving, in some instances, quit-claim, and in others warranty-deeds for the same. He is, therefore, interested in the question involved in, though not in the result of this suit. The admission testified to by Barry, was made, according to his statement, in 1841; while those detailed by David Lore and Paullin were made, either about the time of, or (as seems more probable from their evidence) before, George Lore's removal to the country, which it is shown took place in the spring of 1840.

It is insisted that the proof of these admissions is not only sufficient to show that George W. Lore did in fact execute and deliver to Seth Lore a conveyance in writing, but that it serves the additional purpose of disclosing with requisite clearness and certainty the contents of that conveyance. Upon a careful review of the question, we are unwilling to assign to these declarations so extensive an effect.

It is said that admissions, made in casual conversations, are, in general, the weakest and most unreliable of all the grades of positive evidence; and Mr. Greenleaf, speaking in reference to the proof of the contents of writings by the admissions of the parties, observes: "Very great weight ought not to be attached to evidence of what a party has been supposed to have said; as it frequently happens, not only that the witness has misunderstood what the party said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party did actually say."—1 Greenleaf's Ev. § 96; Threadgill v. White, 11 Iredell, 594. It is obvious, too, that the weight to which such evidence is entitled, diminishes in proportion to the length of time which has elapsed since the occurrence of the conversations of which the witness speaks.

Moreover, in determining the effect we ought to give to George Lore's admissions in this case, it is proper to consider, in connection with them, some other circumstances disclosed by the evidence. With some immaterial variety

Of expression, the admissions, as detailed by the different witnesses, are substantially the same; and it is a fair inference, that when George W. Lore said to Barry, in 1841, that "he had re-conveyed the land to Seth," he was merely repeating the fact which he had previously communicated to David Lore and to Paullin, when he told them that "he had given the property up"—that he had "given the land back to Seth," &c. In other words, the presumption is, that if there was a written conveyance at all, it was in existence when the conversations took place, which are testified to by Paullin and David Lore. If this be not so, then the complainant's whole case, both as to the execution and the contents of the deed, rests upon the single admission proved by Barry. George Lore was arrested upon a charge of murder, in the spring of 1841. The admissions proved by Paullin and David Lore were made a year or more before the arrest; and if they establish a re-conveyance at all, they prove one which must have been executed either before or about the time of George Lore's removal to the country, which, as already stated, took place in the spring of 1840. If this be the case, then there is nothing in the suggestion made in the bill, that it was George Lore's arrest which prevented him and Sheppard from joining in a single deed of re-conveyance. But, if we are to suppose that the re-conveyance from George was not executed until 1841, still it is shown by the evidence that he was on bail in Eufaula, in 1841, for from four to six weeks; that Seth Lore was also in Eufaula during that time, and had frequent opportunities of transacting business with George; and that when George Lore went to the north on bail, Seth was also there. No sufficient reason, therefore, is shown, why George and Sheppard did not join in a single instrument of re-conveyance.

The original deed from Seth Lore to George and Sheppard was duly recorded. On the 25th October, 1841, Sheppard executed a re-conveyance to Seth; and this deed, it is shown, was recorded. If a deed of re-conveyance was in fact executed by George Lore, why was it not also recorded? The original deed from Seth to

George and Sheppard having been registered, there was a manifest propriety in having the re-conveyances put upon the record. There was ample opportunity to do so, whether we are to presume that the deed was executed before George's removal to the country, or in 1841; because Seth Lore was in Eufaula as late as 1842, and, according to one witness, he was there in the fall of 1843. It is also shown, that Seth Lore was, by profession, a land-speculator—that his business was the buying and selling of lands. It is not unfair, therefore, to presume that he was little likely to neglect the precautions usually adopted by persons interested in the transfer of large quantities of real estate; and when we find, as in this case, that he did have recorded the re-conveyance from one of the two grantees, it is difficult to understand why, when he had ample opportunities so to do, he did not also place upon the record the re-conveyance from the other grantee.

At the time the witnesses testified, twelve or thirteen years had elapsed since the conversations took place of which they speak. These conversations appear to have been purely casual. The admissions detailed are certainly couched in vague and indefinite terms. The witness whose evidence is mainly relied on, as proving a declaration by George Lore embodying a statement of the contents of the deed, is, as we have seen, interested in the question involved in this suit. If the admissions were more full and specific, and more clearly and positively identified than they are; still, the consideration of the frailty of human memory, and the uncertainty which, after such a lapse of time, generally attends this description of evidence, might well justify a court in refusing to give them very great weight.

If we were to concede, that the actual existence of a deed from George Lore is satisfactorily established by his admissions, we do not perceive how we could hold that its contents are shown with that clearness which, in such cases, the law wisely requires. The strongest proof for this purpose to be found in the record, is the admission of George Lore to Barry, that "he had *re-conveyed* the land to Seth." Can this admission, waiving all other objec-

tions to it, be deemed sufficient to establish both the *factum* and the contents of the deed? Stretching the words to their utmost capacity, they cannot mean more than that George Lore had executed a certain writing, and that it had the effect of re-conveying the lands to his uncle. So far as such a declaration tends to prove the execution of a deed, it is competent testimony; but the admission of the legal effect of a lost or absent writing is not proof of its contents. The difference is the familiar one between *confessio juris* and *confessio facti*, and is well illustrated by the case of *Bloxam v. Elsee*, 1 C. & P. 558, where the defendant proposed to prove the declaration of the bankrupt, that by certain deeds an interest in a patent-right had been conveyed by him to a stranger; the evidence was rejected, because it involved an opinion of the party upon the legal effect of the deeds.—1 Greenl. Ev. § 96; see *Anderson v. Snow*, 9 Ala. 247.

The complainant must prove, not only that George Lore executed a deed, but that such deed transferred the title to Seth Lore; and this transfer of title he must show by exhibiting to the court the contents of the conveyance, and not by the declaration of the grantor that such was its legal effect. The construction and operation of an instrument can be ascertained by the court only by an examination of its provisions, and not by the judgment of either grantor or witnesses as to its effect.—*Massure v. Noble*, 11 Ill. 531; *Dennis v. Barber*, 6 S. & R. 425.

It is not necessary, however, either to press, or to decide this point. We prefer to rest our judgment upon the ground, that the admissions of George W. Lore, as proved by the witnesses, do not, under all the circumstances disclosed, satisfy our minds of the double proposition, that there was in fact a properly executed deed from George to Seth Lore, and that the contents of the same have been so clearly and fully exhibited to our view that we are able to declare that it operated a legal re-conveyance of the lands in controversy.

The decree of the chancellor is affirmed.

ELLIOTT vs. HOLBROOK, CARTER & CO.

[ACTION ON JUDGMENT.]

1. *Validity of confessed judgment against partnership.*—A partner cannot, without special authority, confess a judgment against the partnership; yet, where the confessed judgment recites, that the defendants, “merchants and partners under the firm name of H., E. & E., came into open court by said H., one of said firm,” and confessed the judgment, this is sufficient, when the judgment is collaterally assailed, to show that said H. had a special authority.
2. *Estoppel by judgment.*—When the recitals of a judgment against a partnership, confessed by one of the partners, show that he had special authority to do so, the other partners are estopped, in an action on the judgment, from denying the truth of the recital.
3. *When action lies on judgment.*—In this State, an action lies on a judgment after the expiration of one year from its rendition, although an execution may also be sued out upon it.
4. *Effect of demurrer to replication.*—Under the Code, (§ 2253,) a demurrer to a replication cannot be visited upon the plea.
5. *Release of partner.*—A release of one partner from a partnership liability is, *prima facie*, a release of all the partners.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by the appellees, suing as partners, against Gardner Elliott; was founded on two judgments, rendered by the circuit court of Greene, on the 18th October, 1848, against Hubbard, Eames & Elliott, of which firm the defendant was a partner; and was commenced on the 15th September, 1856. The judgments sued on were in the following form: “This day came the plaintiffs, and also came the defendants, Moses Hubbard, Edmund C. Eames, and Gardner Elliott, merchants and partners in trade under the name, style and firm of Hubbard, Eames & Elliott, by Moses Hubbard, one of said firm, and acknowledge themselves to owe and be indebted to the said plaintiffs to the amount of \$2,032 62,” (in one case, and \$7,615 19 in the other,) “and confess judgment therefor. It is therefore considered by the court, that the said Holbrook, Carter & Co. recover of and from the said Hubbard, Eames & Elliott the said sum,” &c.

At the fall term, 1856, the defendant pleaded *nul tiel record* and payment, and issue was joined on those pleas; and at the next ensuing term, by leave of the court, the following additional pleas were interposed:

"1. *Actio non*, because he says, that said judgments, in said complaint mentioned, rendered in said court on the 18th October, 1848, in favor of said plaintiffs, and against said firm of Hubbard, Eames & Elliott, were in fact so rendered and obtained by and through the voluntary confessions thereof by Moses Hubbard, a member and partner of said firm; and so said defendant in fact says and avers, that said judgments are not binding on him, and are null and void as to him; all of which he is ready to prove by an inspection of the records of said judgments," &c.

"2. *Actio non*, because he says, that said judgments, in said complaint mentioned, were in fact rendered and obtained by the voluntary appearance and confession of said judgments made by Moses Hubbard, a member and partner of said firm of Hubbard, Eames & Elliott, which appears, as he is ready to prove, by the records of said judgments remaining in said circuit court; and so said defendant says and avers, that said judgments are null and void as to him."

"3. *Actio non*, because he says, that said judgments were rendered and obtained, by and in favor of said plaintiffs, and against said firm of Hubbard, Eames & Elliott, by a voluntary confession thereof by Moses Hubbard, a member and partner of said firm of Hubbard, Eames & Elliott, when neither the said firm nor this defendant had been served with any legal process to bring them into or before said court, as appears from the records of said judgments remaining in said circuit court; and so said defendant says, that said judgments are not binding, and have no legal validity as to him."

"4. And for further answer defendant says, that said judgments were rendered in favor of said plaintiffs, against said firm of Hubbard, Eames & Elliott, by the voluntary confession thereof alone made by Moses Hubbard, a member and partner of said firm of Hubbard, Eames & Elliott,

when neither said firm nor this defendant had been served with any writ or legal process, and had not entered any appearance, or appeared in said court."

"5. And for further answer defendant says, that both of said judgments were rendered in favor of said plaintiffs, against said firm of Hubbard, Eames & Elliott, on the 18th October, 1848, by the voluntary appearance and confession of said judgments, and without any service of process upon the defendants or either of them, made by Moses Hubbard, a member and partner of said firm; that since the rendition and confession of said judgments, and before the bringing this suit, to-wit, on the 25th March, 1856, the said plaintiff, for and in consideration of a large sum of money, to-wit, the sum of \$6,000, to them paid and secured to be paid by the said Moses Hubbard, by a certain deed of release, or instrument in writing, made, signed, sealed and delivered by them, released and discharged said Hubbard from any and all liability to them on account of said judgments, and any and all other claims held by them against said firm of Hubbard, Eames & Elliott; and so said defendant in fact says, that said judgments are fully satisfied and discharged, and that no action can be thereon had or maintained against him; all of which he is ready to verify."

The plaintiffs demurred to the first, second, third and fourth pleas, and filed a special replication to the fifth. The causes of demurrer assigned were, "1st, that neither of said pleas alleges that said Moses Hubbard was not authorized by said defendant to confess said judgments; 2d, that neither of said pleas alleges that said defendant did not assent to the confession of said judgments by said Moses Hubbard; and, 3d, that neither of said pleas presents any sufficient defense to plaintiffs' said action." The replication was as follows: "*Precludi non*, because they say, that the said defendant and said Eames appeared in said circuit court, and confessed said judgments, by said Moses Hubbard; that though true it is that plaintiffs, before the commencement of this suit, released said Moses Hubbard from liability on said judgments, as alleged in said plea; yet, in the deed of release mentioned in said

plea, and by which plaintiffs released said Moses Hubbard from liability on said judgments, plaintiffs expressly reserved the right to proceed against said defendant and said Eames, and to collect from them, or either of them, the balance due upon said judgments; that said Moses Hubbard accepted said release with said reservation and stipulation; and that said release, containing said reservation and stipulation, is the only release ever given by them to said Hubbard."

To this replication the defendant demurred, on the following grounds: "1st, that said replication does not allege that said Hubbard was authorized by the defendant to appear in said court and confess said judgments; 2d, that it does not allege that defendant ever assented to the appearance and confession of said judgments by said Hubbard; 3d, that it does not allege or state how or in what way said defendant appeared in said circuit court by said Hubbard when said judgments were so confessed by him against said firm; 4th, that it does not allege or state that the records of said judgments show that the defendant and said Eames, or either of them, were present or appeared in said court, either in person or by attorney, when said judgments were confessed; and, 5th, that it does not present any legal or sufficient reply to defendant's said fifth plea."

On the argument of these several demurrers, the court sustained the plaintiffs' demurrer to the first and second pleas, overruled their demurrer to the third and fourth pleas, and visited the defendant's demurrer to the replication to the fifth plea on that plea. The plaintiffs then replied to the third and fourth pleas as follows:

"1. *Precludi non*, because they say, that said defendant, before said judgments were confessed by said Moses Hubbard, authorized and empowered said Hubbard to appear in said court, and for him, and in his name, as one of the members of said firm of Hubbard, Eames & Elliott, to confess said judgments in favor of said plaintiffs, and against said defendant as one of the members of said firm; that said Hubbard, in pursuance of said authority, did appear in said court on said 18th October, 1848, and con-

fess the two judgments aforesaid; and so said plaintiffs say, that said defendant is bound thereby," &c.

"2. *Precludi non*, because they say, that said defendant, after the said two judgments had been confessed by said Moses Hubbard, and had been entered up of record in said court, and after said defendant was notified and fully informed thereof, acquiesced therein, and ratified the act of said Hubbard in that behalf; and so said plaintiffs say, that said defendant is bound thereby," &c.

To each of these replications the defendant demurred, and assigned the following grounds of demurrer: to the first replication, because, "1st, it does not allege or state how, in what way, or when said defendant authorized said Hubbard to confess said judgments; 2d, it does not allege that said defendant authorized said Hubbard to confess said judgments by any writing, or any instrument under his hand and seal; and, 3d, it is not a good or sufficient answer in law to said pleas;" and to the second replication, because, "1st, it does not state how, to whom or when defendant acquiesced in and ratified said confession of judgment made by said Moses Hubbard; 2d, it does not allege that defendant acquiesced in or ratified said judgments, either to the said plaintiffs, or to any agent or attorney for them; 3d, it does not allege that defendant acquiesced in or ratified the said confession of judgments, by any writing, deed, or other instrument; and, 4th, it is not a sufficient answer in law to said pleas." The court overruled the demurrers, and issue was then joined on the replications.

The errors now assigned are, the sustaining of the demurrers to the first and second pleas, the visiting of the demurrer to the replication to the fifth plea on that plea, the overruling of the demurrers to the replications to the third and fourth pleas, and several rulings of the court to which exceptions were reserved on the trial before the jury.

WM. P. WEBB, for the appellant.—1. The court erred in sustaining the demurrers to the first and second pleas, because the facts averred in those pleas showed that the

judgments, as to the defendant in this action, were null and void.—McBride v. Hagan, 1 Wendell, 336, and cases cited; Townes v. Springer, 9 Geo. 130; Freeman v. Carhart, 17 Georgia, 348; Mills v. Dickson, 6 Rich. 487; Doe v. Tupper, 4 Sm. & Mar. 261; Green v. Beals, 2 Caines, 254; American Leading Cases, vol. 1, pp. 448-9.

2. The court erred in visiting the demurrer to the replication to the fifth plea on that plea. If the facts alleged in that plea were true, the release of Hubbard discharged and satisfied the judgments entirely, and they could not be made the basis of an action against the defendant. Authorities above cited; also, 3 N. H. 318.

3. The replications to the third and fourth pleas were both bad, for the several reasons specified in the demurrers thereto.—Authorities above cited; also, 9 Johns. 285; 24 Miss. 393. The replications were bad for the further reason, that they averred only legal conclusions, instead of facts.—Gould's Pleadings, 152. If the defendant did in fact authorize the confession of the judgments by Hubbard, then the plaintiffs were not entitled to recover a second judgment: their remedy was a *scire facias*.—Code, §§ 2418-19.

TURNER REAVIS, and S. F. HALE, *contra*.—1. Conceding that one partner cannot, without the assent of his co-partner, confess a valid judgment against the partnership; yet the rule only applies where the want of consent is affirmatively shown. Whatever one partner does, in the name of the firm, is presumed to be authorized by all; and this presumption must be rebutted by the partner repudiating the act. Consequently, the judgments confessed by Hubbard are, *prima facie*, valid and binding on the firm. Moreover, even if the judgments were confessed without the authority or consent of the defendant, they were only voidable at his election; and his subsequent ratification of, and acquiescence in the confession, rendered them valid and binding on him.—Bizzell v. Carville, 6 Ala. 503; McBride v. Hagan, 1 Wendell, 336; Green v. Beals, 2 Caines, 254; St. John v. Holmes, 20 Wendell, 609; Miller v. Hines, 15 Geo. 197; Grier v. Hood,

25 Penn. St. R. 430; Gansevort v. Williams, 14 Wendell, 133; Grady v. Robinson, 28 Ala. 289; Herbert v. Hanrick, 16 Ala. 581. It must be presumed, in order to sustain the judgments, that Hubbard had authority from his co-partners to confess them.—Hodges v. Ashurst, 2 Ala. 301; Bizzell v. Carville, 6 Ala. 503.

2. It is well settled, that an action lies on a judgment, although an execution might legally issue upon it. 18 Ala. 519.

A. J. WALKER, C. J.—The two confessed judgments given in evidence were, in a court of law, when collaterally assailed, valid and binding upon the defendant. It is true, one partner cannot, by virtue of any authority incident to the partnership relation, bind his co-partners by a confession of judgment.—Collier on Part. § 469, note 6; Doe v. Tupper, 4 S. & M. 261; Crane v. French, 1 Wend. 311; McBride v. Hagan, 1 Wend. 326; Harper v. Fox, 7 Watts & S. 142; Bitzer v. Shunk, 1 Watts & S. 340; Witherell v. Holmes, 20 Wendell, 609; Gerard v. Basse, 1 Dall. 119; Grier v. Hood, 25 Penn. St. R. (1 Casey,) 430; Motteux v. St. Aubin, 2 Blacks. 1133; Green & McSher v. Beals, 2 Caines' R. 254; Otis, Mills & Co. v. Dickson, 6 Rich. Law, 487. But one partner may be clothed by his co-partners with a special authority, by virtue of which he may confess a judgment against them.

In determining the jurisdiction of the collaterally assailed judgments of the circuit court, through an interpretation of their language, we must rather incline in favor of, than against the validity of the judgments. King v. Kent, 29 Ala. 542; 2 Smith's Leading Cases, (5th Am. ed.) 842. The language of the judgments, though somewhat ambiguous, examined under the guidance of the principle just announced, is found to assert, that the partner who actually made the confessions of judgment had a competent authority from his co-partners. The record says, that the three defendants, partners, &c., "*came* into open court, by Moses Hubbard, one of the firm, and acknowledged themselves to owe and be indebted," &c. The partners could not *come* into court,

without either a personal appearance, or through the authorized representation of another. It was a legal impossibility for Hubbard's two partners to come into open court by him, unless he had authority to act for them. If it be said that A. B. has executed a promissory note by C. D., the truth is not asserted, unless C. D. had authority to act for A. B. One man cannot be said to perform an act by another, who has no agency or authority from him. The co-partners of Hubbard could not with truth be said to come into open court by him, and confess judgment, unless he had legal authority to represent them. The court, therefore, in saying that the partners came by Hubbard, asserts that Hubbard had a competent authority. The presumption is, that the circuit court knew the law, and was circumspect in its conduct, and neither rendered its judgment through a misapprehension of what constituted a sufficient authority, nor through an inadvertence.—*Hill v. Lambert*, Minor, 91; *Bissell & Carville v. Carville*, 6 Ala. 503; *Hodges & Puckett v. Ashurst*, 2 Ala. 301.

The case of *Brown v. Little*, 9 Alabama, does not militate against the conclusion attained by us. That case not only differs from this in its facts, and in its recitals; but the proceeding was on error, for the reversal of the judgment.

[2.] The judgments being understood as averring that the partner who appeared in person had a competent authority from the other two partners, the defendants in the judgment are estopped, in a court of law, from denying the verity of the record in that particular.—*Brown v. Turner*, 11 Ala. 75; *Crafts v. Dexter*, 8 Ala. 767; *Lightsy v. Harris*, 20 Ala. 409; *Deslonde & James v. Darrington*, 29 Ala. 92; 1 *Smith's Leading Cases*, 841-842. The question, whether the confessed judgments would be reversed on error, does not belong to this case, and we intend by what we have said to intimate no opinion on the subject.

[3.] That the plaintiff had a right, after the expiration of the year from the rendition of the judgments, to sue

upon them, is settled by the decision of this court in Kingsland & Co. v. Forrest, 18 Ala. 519.

The first, and second, and third pleas, demurrers to which were sustained, were bad, because they omitted to aver Hubbard's want of authority to confess judgment for his co-partners. All that those pleas contain may be true, and notwithstanding the court may have had jurisdiction of the defendant's person. Under this decision, these pleas would be bad, even though they averred Hubbard's want of authority; for it is not allowable, in this case, to dispute the verity of the record.

[4.] We have heretofore decided, that no visitation of demurrers upon antecedent pleadings can be had in this State since the adoption of the Code.—Henley v. Bush, at present term. The court erred, therefore, in visiting the defendant's demurrer to the plaintiff's replication upon the 5th plea.

[5.] A release of one partner, from a partnership debt, is, *prima facie*, a release of all the partners.—Collyer on Part. 555, 556, 557, 558, §§ 606, 607, 608. The 5th plea will certainly, upon that principle, aver a good defense, if it be so amended as to show distinctly that the plaintiffs' demand is a partnership liability. Whether the plea, as it now stands, does aver that fact, is a question which we need not decide, as the cause must be remanded for the error already pointed out, and the amendment can be made so as to avoid the question entirely.

The authorities above cited, in reference to the sufficiency of the 5th plea, show that the replication is good, so far as the release is concerned. The plaintiffs' first replication to the 3d and 4th pleas, averring the authority of Hubbard to confess the judgments against the defendant, was certainly sufficient. Whether the second replication was good, it is unnecessary to inquire; because, under this opinion, the question of ratification will not be likely to arise. For the same reason, it is unnecessary for us to examine the question of the competency of the witness, or the admissibility of the parol evidence.

The judgment of the court below is reversed, and the cause remanded.

NESBITT vs. PEARSON'S ADM'RS.

[ACTION ON PROMISSORY NOTE BY ASSIGNEE AGAINST MAKER.]

1. *Sufficiency of complaint in averment of plaintiff's ownership.*—In an action by the assignee against the maker of a note, an averment in the complaint, "that said sum of money mentioned in said note, with interest thereon, is now due to plaintiff," is a sufficient allegation of the plaintiff's ownership.
2. *Conditional note.*—A condition incorporated in a note, to the effect that it may be discharged by the delivery of specific articles within a given time, is for the benefit of the maker; and if he fails to avail himself of it within the prescribed time, the note becomes absolute, and may be declared on, after maturity, according to its legal effect.
3. *Proof of plaintiff's ownership.*—In an action by the assignee against the maker of a note, the plaintiff is not required to prove his ownership, unless it is denied by a sworn plea.
4. *Competency of agent as witness for principal.*—In an action on a note given for the hire of a slave, by an assignee against the maker; the defense being that the owner agreed to sell the slave to the defendant at the expiration of the term, for a stipulated sum including the hire, but afterwards failed and refused to comply with said agreement; an agent, whom the defendant employed to procure the slave for him, and who took a bill of sale in his own name, is a competent witness for the plaintiff, although an action of detinue is pending against him, at the suit of the defendant, for the recovery of the slave.
5. *Abstract charge not presumed.*—Where the bill of exceptions does not purport to set out all the evidence, the appellate court will presume that an affirmative charge was not abstract.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by William Pearson in his life-time, and afterwards revived in the name of his administrators; and was founded on the defendant's promissory note, of which the following is a copy:

"\$265. Twelve months after date, I promise to pay John T. Watson, or bearer, the sum of two hundred and sixty-five dollars, for the hire of a negro man, named Joseph, for twelve months. The above sum may be discharged with two hundred and eighty dollars in merchantable bar-iron, at five cents per pound; to be delivered at the Kossuth forge. January 8th, 1852.

WILSON NESBITT."

The action was commenced on the 19th January, 1853. By the original complaint, the plaintiff claimed of the defendant \$265, "as the assignee of a note executed by the defendant on the 8th January, 1852, payable to John T. Watson, or bearer, on the 8th January, 1853, and by said Watson assigned to the plaintiff"; which note, with the interest thereon, was alleged to be still unpaid. The complaint was afterwards amended, by the addition of another count, in these words: "The plaintiff claims of the defendant the further sum of \$265, due on the following instrument, to-wit:" (setting out the note;) "and the plaintiff avers, that the defendant wholly failed to pay said note on the maturity thereof; and said money mentioned in said note, with interest thereon, is now due to plaintiff." No pleas appear in the record.

On the trial, as appears from the bill of exceptions, the plaintiffs offered in evidence the note sued on, "which was neither endorsed, nor assigned in writing." The defendant objected to its introduction, "on the ground that it did not show any right of action in the plaintiffs;" but the court overruled their objection, and they excepted. The defendant then read in evidence an instrument of writing in these words:

"On the 8th January, 1852, I hired to Wilson Nesbitt, by my agent, John T. Watson, my negro man by the name of Joseph, a hammer-man, for twelve months from date, for which I hold his note for \$265. Now be it known, that I, D. R. Watson, do hereby agree to sell the said negro unto the said Watson at the expiration of his time, for \$1,000, including his hire, should the said Nesbitt conclude to take the boy after trying him. Witness my hand and seal this 2d January, 1852.

D. R. WATSON, [SEAL.]"

It was proved, that this instrument was in fact executed on the 2d February, and was dated in January by mistake; that the negro belonged to said D. R. Watson, and went into Nesbitt's possession under the contract of hiring, and remained in his possession until a few days after the expiration of the term; "that said D. R. Watson, some time during the year 1852, after the execution of

the foregoing instrument, sold and delivered the note sued on to the said Pearson, and also bargained and sold said negro to him; that said Pearson, in company with said D. R. Watson and John T. Watson, on the 4th January, 1853, came to the defendant's premises, where the slave was, and notified the defendant that he had bought said slave from D. R. Watson, and that he claimed the slave as his own under said purchase; that the defendant then refused to acknowledge said Pearson's title to the slave, and declared that he had determined to buy and keep said slave under said written contract executed by D. R. Watson; that said Pearson, after some conversation between all the parties, then agreed to release all right, title and claim to said negro, in consideration of a promise by D. R. Watson to pay him \$50; that Nesbitt then proposed to pay said D. R. Watson the sum stipulated in said written instrument, and \$150 in iron, (or, as stated by another witness, one ton of iron,) if said Watson would agree to let him have the negro; that it was thereupon agreed between said D. R. Watson and Nesbitt, that Watson would sell said negro to Nesbitt on the terms proposed, (the ton of iron to be delivered, at a certain place named, some months thereafter,) and that they should meet at a certain place and time, not more than five or six days thereafter, when and where Watson should receive said sum of \$1,000, should give up Nesbitt's said note for the hire, and should execute to him a bill of sale for said slave; and that the defendant appeared, at the time and place appointed, with \$1,000 in bank-bills, but said Watson failed to appear, and no one appeared for him. Other testimony tended to show, that the only object of the parties, in appointing a time and place of meeting as above stated, was that Nesbitt might pay, and Watson receive the purchase-money for said slave; and other testimony tended to show, that it was agreed between the parties that, at said place and time of meeting, Watson should receive the sum of \$1,000 from Nesbitt, and should deliver to him the note sued on, and should execute to him a bill of sale for the slave, and should also deliver to him a writing by which Pearson

should relinquish all his interest in said slave. It further appeared that said Pearson and D. R. Watson, a few days after said term of hiring expired, went upon the defendant's premises, in his absence, and, without his knowledge or consent, took away said slave; and that Pearson retained the slave in his possession until the sale hereinafter mentioned."

"The plaintiffs then proposed to examine one Newton Smith as a witness, to whose competency the defendant objected. Said Smith, being examined on his *voir dire*, swore, that the defendant, in the year 1854, applied to him to act as his agent in purchasing said slave from Pearson, because, as defendant stated, Pearson would not sell the slave to him directly; that he consented to act as such agent, and was authorized by defendant to give \$1100 for the slave, including the note here sued on; that Pearson refused to sell the slave on these terms, and defendant then authorized him (witness) to buy the slave on such terms as he could, and told him to consult with General Scott about the purchase, who would advise him for defendant, and promised to refund whatever sum he might pay for the slave; that witness accordingly bought said slave from Pearson, as agent for defendant, at the price of \$1100, which sum he paid to said Pearson, and took a bill of sale to himself; that he immediately carried the slave to the iron-works where defendant was engaged in business, and, finding the defendant absent, and believing that he and General Scott were partners in the business, sold and delivered the slave to said Scott, at the price of \$1100, but did not receive payment; that defendant, when informed of the sale to Scott, was dissatisfied with it, and told witness that he and Scott were not partners; that witness bought the slave for defendant, and took the title to himself to secure the re-payment of the money advanced by him; that the defendant afterwards brought suit against Scott for the slave, but Scott died pending the suit; that witness and Scott's personal representative afterwards rescinded the trade, and witness thus obtained the possession of the slave again; that he then offered to let defendant take the slave, if the latter would refund to

him the amount paid to Pearson; that defendant refused to pay said sum, and claimed that witness ought to allow him the value of the slave's hire while in Scott's possession; that witness refused to deliver said slave to defendant, unless defendant would repay the \$1100; that defendant thereupon brought an action of detinue against him for the slave, which action is still pending; that witness did not buy said slave for himself, but as the friend and agent of defendant; that he did not want the slave, but wanted the money which he had advanced; and that he had always been, and was now, ready and willing to deliver said slave to defendant, provided defendant would pay him the money advanced to Pearson. The defendant thereupon objected to the competency of said Smith as a witness, on the ground that he was interested in the suit, and that the verdict and judgment would be evidence for him in the said action brought against him by Nesbitt. The court overruled the objection, and allowed the witness to testify for the plaintiffs; to which ruling the defendant excepted."

"The court charged the jury, among other things, that the written instrument executed by D. R. Watson to the defendant on its face imported a consideration, and that it was binding on said Watson, if supported by a consideration; but that the jury should look to all the evidence in the case, and if they found that said writing was executed without any consideration, then said writing was voluntary, and not binding on Watson. To this charge the defendant excepted, and then requested the court to instruct the jury, that the writing sued on did not show any right of action in the plaintiffs, and that they were not entitled to maintain a suit thereon in their own names; which charge the court refused to give, and the defendant excepted."

All the rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

BROOKS & VARY, for the appellant..

L. W. GARROTT, *contra*..

STONE, J.—There was no error in admitting the note in evidence under the complaint. The second, or amended count, describes it accurately; and the concluding sentence, “and said money mentioned in said note, with interest thereon, is now due to plaintiff,” is a sufficient averment of ownership under the Code, § 2129.—*Letondal v. Huguenin*, 26 Ala. 552; Code, p. 552.

[2.] Neither is there anything in the argument based on the condition in the face of the note, in the words following: “The above sum may be discharged with two hundred and eighty dollars in merchantable bar-iron, at five cents per pound, to be delivered at Kossuth forge.” Such conditions are inserted for the benefit of the maker; and when he neglects to avail himself of them, they cease to have any binding effect on the holder. They are but a privilege, which the promisor forfeits by failing to avail himself of, before or at maturity. At any time after maturity, a note thus framed becomes an absolute promise to pay money; and a complaint, which so describes it, conforms to its legal effect, and is sufficient.—*Plowman v. Riddle*, 7 Ala. 775; *McRae v. Raser*, 9 Porter, 122; *Love v. Simmons*, 10 Ala. 113.

[3.] It was not necessary for plaintiff to prove his ownership of the note, in the absence of a sworn plea denying that fact.—Rule of practice adopted at January term, 1853; rule book, p. 3; 28 Ala. viii.

[4.] We are not able to perceive any ground on which to hold that the witness Newton Smith was incompetent to testify for plaintiff. The verdict and judgment in this case could not be evidence for Smith in another suit.—Code, § 2302.

[5.] The affirmative charge given may be obnoxious to criticism. It is somewhat obscure, and its tendency may have been to mislead the jury. Still, as an abstract legal proposition, we can not say it affirmed anything prejudicial to the rights of the appellant. The bill of exceptions does not assume to set out all the evidence; and we are not at liberty to presume the existence of evidence, as the basis of a reversal: on the contrary, it is our duty to presume there was evidence to justify the charge.

See Partridge v. Forsyth, 29 Ala. 200; Doe *ex dem.* v. Goodwin, 30 Ala. 242.

Under strict rules, it may be that the agreement, bearing date January 2, 1852, is but an offer by Watson to sell, and not a contract until accepted by Nesbitt.—See Falls v. Gaither, 9 Por. 605; Addison on Contr. 24; Chitty on Contracts, 9; Findley v. Bank, 6 Ala. 244.

We find nothing in this charge on which to reverse.

The charge asked was properly refused, for reasons stated above.

There is no error in the record prejudicial to the appellant, and the judgment is affirmed.

SPROWL vs. LAWRENCE.

[ACTION ON SHERIFF'S BOND.]

1. *Judicial notice of time.*—Courts will take judicial notice of the coincidence of the days of the months with days of the week, as shown by the almanac.
2. *Difference between common-law and statutory bonds.*—When a bond is valid only as a common-law obligation, and is not governed by the statutory provisions respecting remedies on official bonds, a suit can only be maintained upon it in the name of the obligee, and there can be but one recovery upon it; while, under the provisions of the Code, (§§ 2154, 131,) any person aggrieved may sue in his own name for the breach of an official bond, and such bond is not discharged by a single recovery; but bonds under which public officers have acted, and which are within the provisions of section 132, though not strictly official bonds, are subject to the same remedies as official bonds.
3. *Construction of statutes.*—A remedial statute must be construed largely and beneficially, so as to suppress the mischief, and advance the remedy; and if the words are not clear and precise, such construction will be adopted as shall appear the most reasonable and the best suited to accomplish the object of the statute, and a construction which would lead to an absurdity will be rejected.
4. *Informal bonds of public officers.*—Section 132 of the Code, respecting informal bonds under which public officers have acted, applies not only to bonds which are “not in the penalty, payable and conditioned as prescribed by law,” but also to bonds which *are* in the penalty, payable and conditioned as prescribed by law, but which were not executed, approved and filed within the time prescribed by law.

5. *Validity of acts and bond of public officer de facto.*—The acts of a sheriff *de facto*, or any other public officer, who comes into office under color of an election, when they concern either the public or third persons who have an interest in the thing done, are as valid as the acts of an officer *de jure*; and in an action on a bond given by him, conditioned for the faithful discharge of the duties of the office, neither he nor his sureties can be heard to question his right to the office.
6. *Forfeiture of public office.*—The failure of a public officer to give bond within the time prescribed by law, (Code, § 125.) only renders him liable to a proceeding for the forfeiture of the office, but does not, *per se*, operate his instantaneous removal from it.
7. *Delivery and acceptance of bond.*—If the bond of a public officer is executed and delivered to the approving officer after the expiration of the time prescribed by law, although he may then have no authority to approve or accept it as a statutory bond, it will be upheld as valid, for the benefit of third persons who may be interested in the discharge of the official acts performed under it.
8. *Sufficiency of complaint.*—The form of complaint prescribed by the Code, (p. 553,) in actions “on bonds with conditions,” applies only to bonds which are valid on their face; but in an action on the bond of a public officer, in the name of the party injured by the breach, if the complaint shows that the bond was not executed and filed until after the expiration of the time prescribed by law, it must also aver that the bond was delivered, and that the officer acted under it.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. WILLIAM S. MUDD.

THE amended complaint in this case was as follows:

“John M. Sprowl } The plaintiff claims of the de-
 } vs. } fendants the sum of one hundred
 C. D. Lawrence, *et al.* } and thirty 94-100 dollars, with
 interest thereon from the 8th November, 1853, as dam-
 ages for the breach of a bond made by them and one
 Tandy P. Duncan, now deceased, on the 20th day of
 August, 1853, in a penalty of ten thousand dollars, with
 the following condition, to-wit: ‘The condition of the
 above obligation is such, that whereas the above-bound
 Tandy P. Duncan was, on the first Monday in August,
 1853, duly elected sheriff of Pickens county, in the State
 of Alabama, for the three years next to come; now, if the
 said Tandy P. Duncan shall well and faithfully discharge
 the duties of the office of sheriff as aforesaid; or *hereafter to*
be described by law, (?) during the time he continues in said
 office or discharges any of the duties thereof, then this

obligation to be void, otherwise it shall remain in full force and effect.' And the plaintiff avers, that the condition of said bond has been broken, in this: that on the same day said bond was made as aforesaid, the said Tandy P. Duncan entered upon the discharge of the duties of sheriff of said county of Pickens, and continued in the discharge thereof until his death, which occurred on the 18th day of April, 1856; that while in the discharge of such duties, on the 27th October, 1853, the said plaintiff recovered a judgment in the circuit court of said county of Pickens, against one James Garrett, for the sum of six hundred and fifty-five 94-100 dollars, besides costs of suit; that on the 8th day of November, 1853, the said plaintiff transferred to one Benjamin Nevitt the sum of five hundred and twenty-five dollars, a part of said judgment, leaving a balance due thereon to said plaintiff of one hundred and thirty 94-100 dollars; that afterwards, to-wit, on the 6th day of May, 1854, an *alias writ of fieri facias* was issued by the clerk of said court on said judgment, returnable to the then next term of said court, which went into the hands of said Tandy P. Duncan, as sheriff as aforesaid, on the same day of its issue; that afterwards, to-wit, on the 6th day of October, 1854, before the return day thereof, and whilst the same was of full force, the said Tandy P. Duncan, as sheriff as aforesaid, received all the money due on said writ of *feri facias*, to-wit, the sum of one hundred and thirty 94-100 dollars, with the interest due thereon, and afterwards returned said writ into the office of the clerk of said circuit court, with his endorsement thereon as follows, to-wit, 'Satisfied in full;' that after said Duncan had so received said money on said *alias writ of fieri facias*, and had returned said writ satisfied, to-wit, on the 26th day of January, 1856, the said money was duly demanded of said Duncan, sheriff as aforesaid, by one Hugh W. McAllister, who was authorized by plaintiff to do so, and to receive the said money; but that the said Duncan failed and refused to pay over the same, or any part thereof, to him, or to the plaintiff, and the same remains wholly unpaid."

The defendants demurred to the amended complaint,

and assigned the following causes of demurrer: "1st, that the alleged bond, described in said amended complaint, was not made and filed in the office of the judge of probate of said county, within fifteen days after the alleged election of said Tandy P. Duncan, as sheriff of said county; 2d, that the office of said Tandy P. Duncan, as sheriff of said county, at the date of said alleged bond, was vacated, and said Duncan, at the time said alleged bond was made, had no legal right to make, nor had the judge of probate of said county any legal authority to receive and file the same in his office; 3d, that said Duncan, at the time said alleged bond was made and filed in the office of the judge of probate, was not sheriff of said county; 4th, that said amended complaint does not state that said alleged bond was ever filed in the office of the judge of probate of said county; 5th, that said amended complaint does not state that said alleged bond was delivered to, and approved by the judge of probate of said county, or that it was delivered to, or received and approved by, any other person authorized to receive and approve the same; 6th, that said complaint does not show any legal right in the plaintiff to sue on the alleged bond in his own name, or to sustain any action on the same in his own name; and, 7th, that the breach of the condition of the alleged bond is not sufficient in law to authorize a recovery by the said plaintiff in this case, as the same is assigned in said complaint."

The court sustained the demurrer to the complaint, and the plaintiff was thereupon compelled to take a nonsuit, which he now moves to set aside; assigning as error the said ruling of the court, to which he reserved a bill of exceptions.

TURNER REAVIS, with whom were S. F. HALE and H. S. SHELTON, for the appellant:

I. The bond is valid, either as a statute bond, or as a common-law bond, and acceptance of it will be presumed, for these reasons:

1. Section 686 of the Code, which requires the sheriff before entering upon the duties of his office, to give bond,

&c.; section 123, which requires the bond to be filed in the office of the probate judge, within fifteen days after the election or appointment; and section 125, which declares the office vacant on failure to file the bond within that time, and requires the probate judge to certify such failure to the governor, are directory merely, and impose as a penalty for non-compliance a forfeiture of the office only in a certain event, to-wit, when the probate judge certifies the failure to give the bond within the time prescribed. Consequently, if there be a failure to execute or file the bond within the time prescribed, and the probate judge does not certify the failure; and the sheriff executes a bond after the time prescribed, and enters upon the duties, and occupies the office under such bond, having been elected to the office, he becomes at least sheriff *de facto*, if not *de jure*; and such bond is good as a common-law bond, at least, and the sheriff and his sureties are liable for a breach of its condition.—McWhorter v. McGehee, 1 Stewart, 546; The State v. Toomer, 7 Rich. 216; Treasurer v. Stevens, 2 McCord, 107; Stephens v. Crawford, 1 Kelly, (Geo.) 574; Crawford v. Howard, 9 Geo. 314; Jones v. Scanland, 6 Humph. 195; Iredell v. Barbee, 9 Ired. 250; State v. McAlpin, 4 Ired. 140; Supervisors v. Coffenbury, 1 Mann. (Mich.) R. 355; Gathwright v. Calloway, 10 Miss. 664; State v. Thomas, 17 Miss. 503; 2 Brock. 96; 12 Wheaton, 64.

2. The complaint shows, that Duncan was either sheriff *de jure*, or *de facto*. He was sheriff *de jure*, because he had been duly elected to the office, and had given bond conditioned for the faithful discharge of its duties. Having been elected, and having given bond, he was, *prima facie*, rightfully in office; and the contrary could only be made to appear by the certificate of the probate judge, that he had failed to file the bond in time, or by a judgment of ouster upon a writ of *quo warranto*. In the absence of such certificate, or such judgment, there could be no vacancy. If he was not sheriff *de jure*, he was *de facto*. He had been duly elected to the office. This gave him color of title; and he continued in the discharge of its duties, under his election, and under the bond sued

upon, *prima facie*, with the assent of the public authorities, for a sufficient length of time to afford individual citizens and the people generally a strong presumption that he was legally in office. Under these circumstances, all his acts were as valid, and he and his sureties were under the same responsibilities, as if he had been sheriff *de jure*. If his acts were so far valid, that his receiving money on an execution was a satisfaction of the judgment on which it issued, surely he and his sureties must be liable for his refusal to pay it over.—Burke v. Elliott, 4 Ired. 855; Gilliam v. Reddick, 3 Ired. 368; Douglass v. Terrell, 11 Ala. 583; also, the authorities last cited.

3. If Duncan had no right to give the bond, after the expiration of fifteen days from the day of his election, the sureties who signed one executed after that time were bound to know it, when they became his sureties. Having signed the bond with this actual or presumed knowledge, and, for more than two years, permitted him to discharge the duties of the office under that bond, it would be allowing them to commit a fraud upon the public, to permit them afterwards to deny their liability upon the bond. They are, therefore, estopped from doing so. Robertson v. Coker, 11 Ala. 466; May v. Robertson, 13 Ala. 86; also, the authorities cited above.

4. The bond is valid under sections 132 and 2154 of the Code: first, because it is within the intent of those sections; and, secondly, -because it is within the letter. It is within the intent, because those sections were evidently designed to embrace every bond under which a person acts as a public officer. It is fairly to be inferred from the language of section 132, that the omission to file the bond would not affect its validity. It is within the letter of section 132, because it is not *conditioned* as prescribed by law. It has the condition prescribed by law, and also a superadded condition. The condition prescribed by law is, "faithfully to discharge the duties of such office during the time he continues therein, or discharges any of the duties thereof."—Code, § 118. The condition of the bond sued upon is, faithfully to discharge the duties of sheriff," "*or hereafter to be described*

by law," &c. Moreover, if an official bond be not *filed* in time, can it be said to be in the penalty, payable, and conditioned as prescribed by law, within the intent and meaning of section 132? It is within the letter of section 2154, because that section authorizes an action on *any* bond *given in an official capacity*, as well as on *any official* bond. This bond was manifestly given in *an official capacity*, if it is not an official bond.

The case of the State v. Shirley, relied on by the appellees to show that the bond sued upon is void for want of delivery, is not like this. In that case, *the State had no interest in the bond, as a State.* The bond was made *solely* for the interests of individuals. For that reason, acceptance of the bond was not presumed. The bond in this case is made to *secure the interests of the State*, as well as of individuals. The State is interested in the condition of the bond being performed, in collecting and paying over fines and forfeitures; in the arrest, imprisonment, and prevention of the escape of offenders against the laws; in the execution of convicts sentenced to death; in the summoning of jurors and witnesses in state cases; and, indeed, in the performance of the condition, by the performance of all the duties of the office of sheriff, in the administration of public and private justice. Not so in the case of the constable's bond, like that in Shirley's case. Upon the very principles laid down in Shirley's case, the bond in this case is valid; for, in that case, it is expressly said, that a bond for the benefit of the State may be taken by an unauthorized person, and acceptance by the State will be presumed. And this principle is re-affirmed in the case of the State v. McAlpin, 4 Ired. 140. Moreover, in this last case, the authority of Shirley's case is greatly shaken; it is departed from, and, in fact, overruled, in the case of Iredell v. Barbee, 9 Ired. 250; and it is in conflict with the great weight of authority.

II. The questions, whether this is the official bond of Duncan, and whether it is void for not having been given and filed within fifteen days after his election, cannot be determined upon the demurrer to the complaint, because, for all appears to the contrary, Duncan filed his official

bond within the time prescribed, and the bond sued upon was given voluntarily, and as an additional bond; in which case it would be binding.—Stephens v. Crawford, 1 Kelly, (Geo.) 583; Supervisors v. Coffenbury, 1 Mann. (Mich.) 355; Todd v. Cowell, 14 Ill. 72; also, the other cases cited above. Or it may have been given pursuant to sections 144, *et seq.* of the Code.

III. The complaint shows, that the bond sued on is either an *official* bond, or a bond *given in an official capacity*, or a bond payable to the plaintiff. In either case, the plaintiff had a right to sue upon it in his own name. If an official bond, or a bond given in an official capacity, he has the right to sue under section 2154 of the Code. If payable to the plaintiff, it is valid, and he had the right to sue for a breach of its condition.—Todd v. Cowell, 14 Ill. Rep. 72; Supervisors v. Coffenbury, 1 Mann. (Mich.) 355.

IV. The complaint is substantially in conformity with the form prescribed by the Code, (p. 553,) for declaring upon a bond with condition. This form does not allege a delivery. The word “made” is used, which includes a delivery. The complaint in this case uses the word “made,” which is equivalent to “executed,” and implies a delivery.—Jenkins v. McConico, 26 Ala. Rep. 214; Puryear v. Beard, 15 Ala. Rep. 17. Whether it does or not, if it conforms to the form prescribed by the Code, it is sufficient.

V. The breach is unquestionably sufficiently alleged in the complaint.

VI. The objection that the complaint does not show to whom the bond is payable, was not made in the court below. This is not only a fact, but is shown by the record; for, if it had been made, the court, in its judgment on the demurrer, would have granted leave to amend, which was not done. Besides, that question cannot be made now, because it is not *distinctly* stated in the demurrer.—Code, § 2253; 27 Ala. 640. If raised by the demurrer at all, it is only by way of argument and inference. Moreover, the law presumes that every public officer does his duty, until the contrary is shown.—12 Wheat. 64; 6 Cond. Rep.

Supreme Court of the United States, p. 445, and authorities there cited.

The probate judge is a public officer. Section 686 of the Code requires him to fix the amount of the bond, in a sum not less than \$5,000. The penalty of this bond is \$10,000, which shows that the probate judge fixed the amount. The sheriff is required to give the bond, payable and conditioned as required by section 118. The probate judge is required to approve it, and file and record it. Section 120 directs the probate judge not to approve a bond, unless it is in the penalty, *payable*, and conditioned as required by law. If it is to be presumed that he did his duty, then the presumption is, that the bond is payable to the State, as required by section 118. In that event, the plaintiff shows a right to sue in his own name, under section 2154.

Again; the complaint sufficiently shows that Duncan *acted* under the bond. It therefore stands in the place of an official bond, on which the plaintiff may sue in his own name.—Code, §§ 132, 2154.

The complaint is entitled to every reasonable intendment and construction.—1 Chitty's Pl. 237, top.

Again; it may be an additional *statutory* bond, given under sections 144, *et seq.* of the Code.

E. W. PECK, A. A. COLEMAN, and A. B. CLITHERALL, *contra*, made the following points:

1. The court will take judicial notice of the fact, that the first Monday in August, 1853, was the first day of the month.—Allman v. Owen, 31 Ala. 167; 1 Greenl. Ev. § 5. The complaint shows, therefore, that the bond was not made until after the expiration of the time prescribed by law.

2. At the time the bond was made, the office of sheriff of the county was vacated. Section 125 of the Code expressly declares, that if the person elected to any office fails to file his bond within the time prescribed by law, "he vacates his office." By section 161 it is declared, that an office is vacated, "1st, by death; 2d, by resignation; 3d, by ceasing to be a resident of the State; 4th,

by the decision of a competent tribunal; 5th, by act of the general assembly abridging the term of office; and, 6th, "in such other cases as are or may be declared by law." The failure to give bond, under section 125, is certainly one of the "other cases declared by law," within the meaning of the last clause of section 161; and the statute makes no distinction between the several modes in which an office may be vacated. The office being vacant when bond was given, the coroner was really sheriff, and the probate judge had no authority to accept or approve it. Code, § 696; Shirley's case, 1 Iredell, 597; Wall's case, 2 Iredell, 267; Pool's case, 5 Iredell, 105; McLean v. Button, 19 Barbour, 450.

3. A sheriff's bond is required to be made payable to the State of Alabama.—Code, § 118. The complaint does not allege that the bond here sued on was payable to the State of Alabama, or to any officer thereof, or to any other person; consequently, it shows no cause of action in the plaintiff. To entitle a party to sue on a bond in his own name, he must show that it is payable to him, or that it has been assigned to him, or that it is an official bond payable to the State of Alabama.—Code, §§ 2154, 1530; Wilson v. Cantrell, 19 Ala. 642.

4. The complaint does not state that the bond was filed in the office of the judge of probate, or that it was approved or accepted by him, or that it was delivered to him or to any other person. The alleged bond, therefore, is not shown to be valid, either at common law or by statute; and a delivery cannot be presumed, because it is not alleged that the bond was payable to any person, or that it was made for the benefit of the State.—Stephens v. Crawford, 1 Kelly, 574; Crawford v. Howard, 9 Geo. 314; State v. Shirley, 1 Iredell, 597, 605; State v. McAlpin, 4 Iredell, 148; State v. Wall, 2 Iredell, 267; State v. Pool, 5 Iredell, 105.

5. Section 132 of the Code does not aid the appellant, because the bond is not shown to be valid, either by statute or at common law; nor does the complaint aver that Duncan acted under it. Moreover, that section is, in terms, confined to bonds which are not "in the penalty, payable

and conditioned as prescribed by law," and has no application to bonds which are defective because not executed and filed within the prescribed time.

6. The bond cannot be held valid as an additional bond, (Code, §§ 136, *et seq.*) because the complaint does not aver that it was so executed, nor do the averments of the complaint authorize the inference that it was so executed.

7. The illegality of the bond may be reached by demurrer to the complaint.—Renfro v. Heard, 14 Ala. 23; Prewitt v. Garrett, 6 Ala. 128.

8. The sureties are not estopped from alleging the invalidity of the bond.—McWhorter v. McGehee, 1 Stew. 552; 1 Kernan, 598; 2 Smith's Leading Cases, 538; 28 Ala. Rep. 529.

R. W. WALKER, J.—The bond, as set forth in the complaint, recites that the principal obligor was elected sheriff on the first Monday in August, 1853; and it is alleged that the bond was executed on the 20th August, 1853. We will take judicial notice of the fact, that the first Monday in August, 1853, was the first day of that month.—Allman and Wife v. Owen, 31 Ala. 167.

[2.] It thus appears that, at the time the bond was executed, more than fifteen days had elapsed since the election of Duncan as sheriff. Hence arises the question, whether this is a valid "official bond;" or, if not to be considered strictly as an "official bond," whether it is nevertheless subject to all the remedies provided in reference to "official bonds." If valid only as a common-law obligation, and not governed, as to the remedies which may be maintained upon it, by the rules applicable to statutory or "official bonds," it would follow, that a suit instituted upon it must be brought in the name of the obligee.—Wilson v. Cantrell, 19 Ala. 642; Taylor v. Arthur, 9 Sm. & M. 192. And it would also result, that section 131 of the Code, which provides that "official bonds" are not discharged by a single recovery, would not apply to it.—Garnett v. Yoe, 17 Ala. 74; Stephens v. Crawford, 3 Kelly, 499. This last consideration invests

the question, as we have stated it, with unusual importance and interest; and we have examined with much care the sections of the Code which are supposed to bear upon it.

It is insisted that "official bonds," in the sense in which those terms are employed in sections 130 and 131 of the Code, are bonds which have been executed, approved and filed within the time, and which are in the penalty, payable, and condition, as prescribed by the preceding sections. For the purposes of this opinion, we may admit that this is so; though we do not desire to be understood as deciding, that a strict conformity to all the directions of those sections is essential to constitute an "official bond," within the meaning of sections 130 and 131. The bond in this case, not having been approved or filed within the time prescribed, does not, according to the concession thus made, belong to the class of instruments designated in these two sections. But, by section 132, "Whenever any officer, required by law to give an official bond, acts under a bond which is not in the penalty, payable and conditioned as prescribed by law, such bond is not void, but stands in the place of the official bond, subject, on its condition being broken, to all the remedies which the person aggrieved might have maintained upon the official bond of such officer, executed, approved and filed according to law." In point of fact, therefore, the distinction between "official bonds," strictly so called, and the bonds referred to in section 132, so far as the remedies to which they are subject are concerned, is rather nominal than real, as the latter, to all intents and purposes, stand in place of the former.

[3-4.] It is insisted, however, that this section does not embrace the bond here sued on, because this bond is in the penalty, and payable and conditioned as prescribed; and because, moreover, that section only applies to bonds which, though not in the penalty, payable and conditioned as prescribed, have yet been approved and filed in due time.

An examination of the various provisions of the Code, in reference to the bonds of public officers, will satisfy

any one of the studious solicitude with which the legislature has sought to afford the most ample protection to all persons interested in the performance by such officers of their official duties. The section we are considering is a part of the legislation designed to effect this general object; and it is our duty to put upon it such a construction, as will harmonize with the substance and spirit of the text to which it belongs. It is a remedial statute; and we must construe it largely and beneficially, so as to suppress the mischief and advance the remedy; or, in the language of Lord Coke, so as "to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*."—Heydon's case, 3 Rep. 7; Sedgwick on Statutes, 359–60. It must be admitted, that the words of this section are not as clear and precise as they might be; and it is a well-settled rule, that when the words are not precise and clear, such construction will be adopted as shall appear the most reasonable, and best suited to accomplish the object of the statute; and a construction which would lead to an absurdity, ought to be rejected.—Commonwealth v. Kimball, 24 Pick. 370; Smith on Stat. Constr. §§ 516–18.

Viewing section 132 in the light of these rules, we cannot assent to the construction of it urged by the counsel for the appellee. The result to which that construction leads, demonstrates, in our opinion, its fallacy. By section 120 it is declared, that the bond of any officer, which is not in the penalty, and payable and conditioned as prescribed by law, "should not be approved;" and that the officer approving the same, "neglects his duty." Section 132 is evidently based on the supposition, that bonds which were not in the penalty, and payable and conditioned as prescribed, would, or, to say the least, might not be approved and filed; and this for the simple reason, that the officers entrusted with the authority to approve and file, are advised by an emphatic admonition from the legislature that such bonds "should not be approved," and that no bond shall be filed unless first approved.—Code, §§ 120, 126. Hence, the language is, that such a bond, if the officer executing it "*acts under it*,"

shall be subject to all the remedies which could be maintained "on the official bond of such officer, executed, approved, and filed according to law." These last words seem to imply, that a bond which did not conform to the statutory requirements, as to penalty, payee and condition, would not be executed, approved, or filed according to law. And yet, if the sheriff *acts under* such a bond, it stands in the place of, and is subject to all the remedies which could be maintained upon the official bond of such officer, executed in all respects in strict conformity to the statute. Hence we conclude, that so far as the operation of section 132 is concerned, it makes no difference, whether the bonds there spoken of have or have not been approved and filed. The bonds referred to in that section, could not be properly approved or filed; for the law expressly declares, that bonds thus defective *should not be approved*, and that the officer who does approve them *violates his duty*. If a bond is approved and filed, when it should not have been; and if the officer who approves and files it, violates his duty in doing so, the act of approval and filing, *it would seem*, cannot be otherwise than nugatory as such, though it would doubtless be convenient and plenary proof of the delivery of the bond by the obligors. This section, therefore, in our judgment, applies to a bond which does not conform to any of the statutory requirements, either as to its penalty, payee, conditions, approval, or filing, *provided* the officer executing it has acted under it. Much more clearly does it apply to a bond which the officer executing it has acted under, and which does conform to all the requirements of the law, except the last two—approval and filing. To hold otherwise, would be to maintain the paradox, that the validity of the bond is enhanced by its increased imperfections—that a total is less hurtful than a partial departure from the statute, and that an instrument in fact gets better as it grows worse.

[5.] It is urged, however, that section 125 of the Code, which provides that, if any officer fails to file his bond within the prescribed time, "he vacates his office," is imperative; and that such failure absolutely and instantaneously

neously creates a vacancy in the office, and divests the title of the officer, without the institution of any legal proceedings to have the fact ascertained and adjudged. Hence it is said, that Duncan was not the sheriff when this bond was executed, his right to the office having been completely and irrecoverably lost by his failure to file his bond within the fifteen days. If we concede that this is so, and that Duncan was not at the time sheriff *de jure*; still, inasmuch as he came into office under color of an election, he was not a mere naked usurper without any claim of right, but he was sheriff *de facto*; and his acts, when they concerned the public, or third persons who had an interest in the thing done, were as valid as the acts of a sheriff *de jure*.—People v. White, 24 Wend. 526; People v. Hopson, 1 Denio, 575; Hall v. Luther, 13 Wend. 494; People v. Stevens, 5 Hill, 630; Crawford v. Howard, 9 Geo. 316; Kottman v. Ayer, 3 Strobb. 94-5; Wilcox v. Smith, 5 Wend. 231; Gilliam v. Redick, 4 Ired. 368; Burks v. Elliott, 4 Ired. 355.

A bond executed by him, and conditioned for the faithful discharge of the duties of the office, will be upheld as a valid obligation; and those who have voluntarily bound themselves, as his sureties, cannot absolve themselves from liability, by alleging that he was no sheriff. It would seem, therefore, that in a suit upon the bond of a sheriff *de facto*, neither he nor his sureties can allege that he was not sheriff *de jure*.—Authorities *supra*; Jones v. Scanland, 6 Humph. 195; United States v. Maurice, 2 Brock. 97, 113; Stephens v. Crawford, 1 Kelly, 574; S. C., 3 Kelly, 499; Iredell v. Barbee, 9 Ired. 250; Green v. Wardwell, 17 Ill. 278; Crawford v. Howard, 9 Geo. 314; Douglass v. Wickwire, 19 Conn. 489; Aulanier v. Gov'r, 1 Texas, 653. If this be so, then the only purpose for which the defendant in this suit could rely upon Duncan's failure to file his bond within fifteen days, would be to show that the bond does not conform to the statute, and is not subject to the regulations and remedies applicable to statutory bonds; and we have already seen that, for that purpose, the fact of such failure is in this case of no avail to the defendant.

[6.] We do not think, however, that the mere failure of a public officer to file his bond, within the prescribed time, effects his absolute and instantaneous removal from office.

In South Carolina, by an act of the legislature, every master in equity was required, within three weeks after his election, to tender his bond for approval; and, on its being approved, to deposit it with the treasurer, and sue out his commission; "and upon his neglect or failure to do so within the said time, his office shall be deemed absolutely vacant, and shall be filled by election or appointment as heretofore provided." He was also required to take certain oaths, and endorse them on his commission; "and unless the said oaths be so taken, endorsed, and subscribed, within ten days from the issuing of the commission, the said commission shall be utterly null and void, and the said office deemed absolutely vacant." The court of appeals of that State, in considering this act, holds, that the failure of the officer to comply with the above requirements is cause of forfeiture, but not a forfeiture *ipso facto*; that the only efficacy imparted to the official title of an officer elect, by a strict compliance with these directions, is to protect the title against forfeiture; and that if the State sees proper to excuse his delinquency, by granting him a commission, the defects of his title are cured, and it is converted into a title *de jure*, having relation back to the time of his election.—State v. Tomer, 7 Rich. 216; Kottman v. Ayer, 3 Strobb. 92; Treasurer v. Stevens, 2 McCord, 107; McBee v. Hoke, 2 Speers, 138.

And in reference to a similar statute in Georgia, the supreme court of that State says: "If the sheriff fails to qualify, he forfeits his right to the office. But the proper officers of the law must pronounce the forfeiture."—Crawford v. Howard, 9 Geo. 316.

Whenever the constitution provides for the election of an officer, he derives his title to the office from the election, and not from his commission, which is the mere evidence of his right.—Wammack v. Holloway, 2 Ala. 31; Kottman v. Ayer, 3 Strobb. 94; Marbury v. Madison, 1 Cranch, 137; Garner v. Clay, 1 Stew. 182. By virtue

of his election, Duncan was sheriff, so far as his mere right to the office was concerned, before he executed his bond; just as the lawful successor to a throne is king before his coronation. The election having thus invested him with his title to the office, the statute requiring him to file his bond within fifteen days, and providing that on his failure to do so "he vacates his office," operates as a defeasance, and not as a condition precedent. The question we are considering is, therefore, analogous to that which arises in reference to corporations, when they do some act which, it is provided by their charter, shall amount to a forfeiture of their vested rights; and the decisions in such cases are in point here.

The supreme court of Louisiana has decided, that the clause in the bank-charters of that State, which declares that, in case of a suspension of specie-payments for more than ninety days, the charter shall be, *ipso facto*, forfeited and void, gives to the State the right to claim the forfeiture, in an action instituted for that purpose; and although the bank may have forfeited its corporate life, it continues to live as long as the State does not claim the forfeiture.—*Atchafalaya Bank v. Dawson*, 13 Louis. 497.

In New York, an act of the legislature provided, that whenever any incorporated company shall, for one year, have suspended business, "such company shall thereby be deemed and adjudged to have surrendered the rights granted by any act of incorporation, and shall be deemed to be dissolved." This act was construed to mean that in such cases an information may be filed, and pursued to judgment of dissolution—not that the corporation shall be deemed at an end without such proceeding.—*People v. Hillsdale Co.*, 23 Wend. 257. See, also, *Bank of Niagara v. Johnson*, 8 Wend. 645; *People v. Manhattan Co.*, 9 Wend. 351; *Proprietors, &c. v. Newcomb*, 7 Mete. 276; *Mechanics' B. A. v. Stevens*, 5 Duer, 676; *Mickles v. Rochester Bank*, 11 Paige, 118.

It is laid down as an established principle, that until the forfeiture of a charter is judicially decreed, neither the forfeiture nor the cause of it can be inquired into in another suit, nor can the existence of the incorporation

be questioned incidentally or collaterally.—2 Kent, 312, and cases there cited; 13 La. 503.

Our conclusion is, that the failure of a legally elected sheriff, to file his bond within the time prescribed, does not, by its unaided force, operate his instantaneous removal from office; and that a bond, executed by him more than fifteen days after his election, and before any step or proceeding on the part of the State to effect his amotion, must be considered as the bond of an “officer,” within the meaning of section 132 of the Code. What act or proceeding would be necessary to effect his removal from office, is a question not now before us, and we do not decide it. We limit our decision to the proposition above stated. The necessities of the case do not require us to go, and we do not go beyond it.—See, further, Wammack v. Holloway, 2 Ala. 31; Hill v. State, 1 Ala. 559; McWhorter v. McGhee, 1 Stew. 552; Johnston v. Wilson, 2 N. H. 202.

This construction of the section is confirmed by the legislative interpretation of it, furnished by the act of 1854, (Session Acts, 1853–4, p. 102,) which authorized sheriffs, who had failed to give bond within the time prescribed, to do so at any time before the 1st Monday in March, 1854; and provided that, if they gave such bond, they should not be subject to a forfeiture of their offices. This is a clear declaration of legislative opinion, that by virtue of section 125 of the Code, those sheriffs who had failed to give bond within fifteen days were merely subject to a forfeiture of their offices, but had not absolutely vacated them. Upon any other hypothesis, the act of 1854 was clearly unconstitutional. If the failure to file the bond in the prescribed time effected, *eo instanti*, the actual ouster of the officer, and had all the force of a judgment of forfeiture, then it was not in the power of the legislature to restore him to office. The legislature can waive a forfeiture, but it cannot elect a sheriff. A sheriff, who has been lawfully deprived of his office, can be reinducted into it only in two ways—by an executive appointment, or a popular election.

[7.] It is insisted, however, that inasmuch as this bond

was not executed until more than fifteen days had elapsed after the election, the probate judge had no authority to accept it; and acceptance being essential to delivery, the bond is not a valid obligation for want of delivery. Although the probate judge may have had no legal authority at the time to approve, or even to accept the bond, as a statutory obligation; yet, if it was signed by the obligors, and delivered to him as the bond of the sheriff, and the latter acted under it, it is to be considered as delivered to the judge for the benefit of all persons who may be interested in the discharge by the sheriff of the duties, which it is therein stipulated he will perform; and it will be upheld as a valid obligation. In such cases, any act, which is intended by the obligors as a delivery of the instrument, will be so treated.—*Stephens v. Crawford*, 3 Kelly, 508; *Thomas v. White*, 12 Mass. 368; *Green v. Wardwell*, 17 Ill. 278; *Crawford v. Howard*, 9 Geo. 317; *Speake v. U. S.*, 9 Cranch, 28; *Alston v. Alston*, at the present term.

It is true that a different principle was announced by the supreme court of North Carolina, in *Shirley's case*, 1 Iredell, 597; and this decision was adhered to in subsequent cases. In the *State v. Pool*, 5 Iredell, 112, Chief Justice Ruffin states, that the rule, as settled in *Shirley's case*, was adopted "with much hesitation, and against his impression." See, also, *State v. McAlpin*, 4 Iredell, 148. It is certainly opposed to reason, public convenience, and authority; and we cannot consent to adopt it.

We hold, therefore, that a bond, executed by a legally elected sheriff, more than fifteen days after his election, and under which he has acted as sheriff, is subject to all the regulations applicable to "official bonds;" that on its condition being broken, it may be sued on by the person aggrieved in his own name; and that successive recoveries may be had thereon, until the whole penalty is exhausted.

[8.] The complaint, however, is defective, because it does not aver that the bond was delivered, or that Duncan, as sheriff, acted under it. The form in the Code (p. 553) must be understood to apply to cases where the bond is

upon its face valid. But in this case, the suit being in the name of the party injured, and the complaint disclosing the fact that the bond was not executed and filed within fifteen days after the election, no right of action is shown. To render this bond valid as a common-law obligation, its delivery as a security for the faithful discharge of the duties of the office of sheriff was necessary; and to bring it within the influence of the regulations applicable to official bonds, so as to authorize a suit in the name of the person injured, it must not only have been delivered, but the principal obligor must have acted under it as sheriff. The averment of these essential facts being omitted, the demurrer was properly sustained.

The judgment of the circuit court is affirmed.

PEARCE vs. BANK OF MOBILE.

[SUMMARY PROCEEDING AGAINST BANK DEBTOR.]

1. *Proviso to statute.*—The natural and appropriate office of a proviso to a statute is to restrain or qualify some preceding matter; and it should always be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter.
2. *Construction of act of 1852, extending charter of Bank of Mobile.*—The first proviso to the act of February 9, 1852, (Session Acts 1851-2, p. 104,) “to extend the charter of the Bank of Mobile,” which limits the rate of interest to be charged by the bank on its loans and discounts to six per cent., does not apply to loans and discounts made before the commencement of the extended charter.
3. *General and special statutes.*—A special statute, conferring on a particular bank a summary remedy for the collection of its debts, is not repealed or affected by a subsequent general law, unless the latter act clearly manifests on its face such intention.
4. *Repealing statutes.*—It is an established principle, that a subsequent statute shall not repeal a former one by implication, unless the two are so inconsistent that they cannot stand together.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS was a summary proceeding, by notice and motion, instituted by the Bank of Mobile, against George L. Pearce, and was founded on the defendant's promissory notes for \$2,900, dated the 8th March, 1857, payable and negotiable at the Bank of Mobile, ninety days after date, to David Stodder, by whom it was endorsed and transferred to the said bank. The notice was issued on the 13th January, 1858, was served on the defendant on the same day, and notified him that motion for judgment would be made against him at the next ensuing term of the city court, to be held on the first Monday in February, 1858.

At the return term of the notice, the defendant moved the court to strike the cause from the docket, and also demurred to the complaint, on the following specified grounds: "1st, because the notice shows that it was not issued and served twenty days before the first Monday in February, to which it is returnable; 2d, because the legislature of Alabama has passed an act repealing the act which conferred on said plaintiff a summary remedy for the collection of its debts; and, 3d, because the action is not commenced by summons and complaint." The court overruled both the motion and the demurrer; to which rulings the defendant reserved exceptions.

The defendant then pleaded the general issue, with two special pleas, which were as follows: "2. *Actio non*, because he says, that the note declared on was discounted by the plaintiff in 1857; that said plaintiff charged at the rate of more than six per cent. per annum, to-wit, seven per cent. per annum, on said loan or discount; and that said note was not discounted in the settlement of any bad or doubtful debt or debts; all of which he is ready to verify," &c. "3. *Actio non*, because he says, that heretofore, to-wit, on the 9th February, 1852, the legislature of Alabama passed an act to extend the charter of the Mobile Bank, approved February 9, 1852, which said extended charter was accepted by said plaintiff, and is in the following words," &c. "And the defendant avers, that the note here sued on was discounted in the year 1857; that more than six per cent. per annum, to-wit,

seven per cent. was charged for the said loan or discount; and that said discount was not made in settlement of any bad or doubtful debt or debts: all of which he is ready to verify," &c. The plaintiff demurred to each of these special pleas, on the following grounds: "1st, because neither of them presents a bar to the action; 2d, because neither of them contains an answer to the whole cause of action, while both profess to do so." The court sustained the demurrers, and the defendant excepted.

The act of 1852, referred to in the second special plea, the construction of which involves the main question in the case, is in the following words:

"An act to extend the charter of the Mobile Bank.

"SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened*, that the powers, privileges and capacities, heretofore granted to the said Bank of Mobile, by virtue of its original act of incorporation, and all of the several acts extending the same and amendatory thereof, are hereby continued in force for the term of twenty years from the expiration of the present charter of said bank; *provided*, that the said bank shall, in no case, charge more than six per cent. per annum on its loan or discounts, except in cases of settlement made to secure bad or doubtful debts; *and provided further*, that the said bank shall receive on deposit the funds of the county or city of Mobile, and pay out the same in such amounts as may be drawn for, for which it shall receive no compensation.

"SECTION 2. *And be it further enacted*, that the commissioner and trustee is hereby authorized to arrange with said bank the amount due to it by the State; charging the said bank one hundred thousand dollars as a bonus for said extension of charter; *and provided*, that the amount due upon said bonus shall be paid in sums not less than five thousand dollars per annum."

"Approved, February 9, 1852."

This act was subsequently amended, by an act approved on the 6th February, 1858, (Session Acts 1857-8, p. 18,) which is in the following words:

“*An act to amend an act, entitled ‘An act to extend the charter of the Mobile Bank.’*”

“SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened, that the first provision of an act, entitled ‘An act to extend the charter of the Mobile Bank,’ approved February 9th, 1852, be, and the same is hereby, so amended as to provide that the Bank of Mobile may discount notes or bills running more than six months, and not more than nine months, at a rate not to exceed seven per cent. per annum, and notes or bills running nine months or more at a rate not exceeding eight per cent. per annum.*”

On the trial before the jury, as appears from the bill of exceptions, the plaintiff read in evidence the note sued on, accompanied with its protest for non-payment, and proof by the certificate of the president that it was really the property of the bank. The defendant then proved, that said note was discounted by the bank, on the 22d April, 1857, at the rate of seven per cent. per annum; and that it was not so discounted in settlement of any bad or doubtful debt; also, that the bank, prior to the discount of said note, had paid the State of Alabama one hundred thousand dollars, as a bonus for the extended charter under the said act of 1852.

“On this evidence, the court charged the jury, that if they believed the evidence, the plaintiff was entitled to recover.’ The defendant excepted to this charge, and requested the court to instruct the jury, ‘that if they believed from the evidence that said note was discounted by said Bank of Mobile at the rate of more than six per cent. per annum, and that it was not discounted in settlement of, or to secure a bad or doubtful debt, then the plaintiff could not recover.’ The court refused this charge, and the defendant excepted.”

All the rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

WM. BOYLES, for appellant.—1. The act of 1854, “to regulate the practice in the city and circuit courts of Mobile,” repeals the act which gave to the bank a summary

remedy for the collection of its debts. The fifth section of the act of 1854 is general and comprehensive, applying to "all suits" instituted in either of said courts; while the twelfth section expressly repeals "all laws and parts of laws conflicting with the provisions of said act." It was competent for the legislature to take away this summary remedy, although conferred by the act of incorporation; because the act of incorporation is partly a contract, and partly a law; and while the contract may be inviolable without the assent of the bank, it cannot be doubted that the remedy conferred may be altered or modified by subsequent statute.—3 Story on Constitution, 250; 8 Sm. & Mar. 9; 10 Sm. & Mar. 599; 11 Sm. & Mar. 323; 12 Sm. & Mar. 347; 4 Gill, 221; 1 Denio, 128; 7 Humph. 84; 1 Scam. 335; 3 Pike, 285; 1 Branch, (Fla.) 356; 6 Shep. (Me.) 109; 2 Barbour, 316; 4 *ib.* 295; 6 *ib.* 327; 10 How. (U. S.) 190; 1 *ib.* 317; 4 Peters, 414; 11 Peters, 257; 3 Eng. 236; 2 Doug. 338; 7 Cranch, 165; R. M. Charl. (Geo.) 324; 14 Geo. 327; 9 How. (U. S.) 172. The language of the repealing act is clear and unambiguous, and leaves no room for construction; and effect must therefore be given to its words, although it may be doubtful whether the legislature intended them to be so general in their operation.—King v. Carter, 4 Burr. 2026; Smith on Statutes, 888; 6 B. Monroe, 154; 4 McLean, 463; 2 Dana, 345; 16 Barbour, 18; 19 Ala. 742. The bank is not thus left without remedy for the collection of its debts, but is merely placed on the same footing with individuals.

2. The extended charter of 1852 was accepted by the bank. The act was passed at the instance of the bank, and its provisions are manifestly beneficial to the bank; consequently its acceptance is to be presumed.—Angell & Ames on Corporations, 52, 53; 7 Pick. 344; U. S. Bank v. Dandridge, 12 Wheaton, 71; 14 Pick. 53. The demurrer to the special pleas admits that the amended charter was accepted, and proof of the payment of the bonus under its provisions places the question of acceptance beyond controversy. The charter, when accepted, takes effect from its passage.—1 Scam. 555, and cases there cited. The acceptance cannot be partial or condi-

tional: the bank could not accept the part which was beneficial to it, and reject all the burdens and restrictions imposed by other parts.—7 Dow & Clarke, 267; 7 Bing. 21; 4 Barn. & Cress. 78; 2 Dow & Clarke, 21.

3. The extended charter of 1852 restricts the bank to six per cent. interest on its loans and discounts. This construction is evident from the language of the act itself, and from a consideration of its provisions in connection with other acts bearing on it. The provisos contained in the first section make the grant of the extended charter conditional on their performance. A proviso to a statute is a "limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided."—10 Peters, 449. The two provisos are alike in terms, and stand as conditions annexed to the grant. Both were intended to operate on the existing privileges of the bank, and there is no reason for a difference of construction as to their operation. The legislature may have had no right to restrict the rate of interest allowed to the bank by its act of incorporation, or to require it to collect and disburse the revenue of Mobile county without compensation; but, when the bank was a petitioner before that body for an extension of its chartered privileges, the legislature had a clear right to impose restrictions, limitations and conditions, as the consideration of the favors and privileges conferred. The restrictions or conditions annexed to the grant of the amended charter are contained in the two provisos to the first section, which stand together in the act, the one contemplating a restriction, and the other imposing a duty, as the consideration of the extraordinary privileges conferred. If any doubt could exist as to the intended present operation of the second proviso, it is removed by the third section of the act in relation to the collection and disbursement of the revenue of Mobile county, which was passed on the same day the extended charter was granted, and which expressly provides that the bank shall receive and disburse the county revenue from and after the first day of April, 1852. If the two provisos were

not intended to have a like present operation and effect, it is strange that the terms employed in both should be the same, and so well suited to give them such an operation. Moreover, the subsequent act of 1858, amending the first proviso to the act of 1852, amounts to a legislative declaration of the meaning of that proviso, as well as a distinct admission by the bank, at whose instance it was passed, that the construction here contended for is correct.—3 How. (U. S.) 556; 2 Y. & J. 300; Smith on Statutes, 758.

4. If the meaning of these grants, provisos and amendments, in regard to the powers and restrictions of the bank, be at all doubtful, the courts will not so construe them as to extend the powers and immunities of the bank by implication.—Sedgwick on Stat. Law, 339; 27 Penn. St. (3 Casey,) 309; 11 How. (U. S.) 81.

5. If the construction of the amended charter above contended for be correct, then the contract by which the bank obtained the note here sued on, at a greater discount than six per cent., is in violation of its charter, and consequently void.—1 B. & P. 340; 2 *ib.* 274; 3 Vesey, 612; 6 T. R. 723; 1 Brod. & Bing. 447; Dyer, 356; Hobart, 72; 13 Conn. 262; 2 Cowen, 679; 7 Wendell, 31; 19 John. 1; 9 Wheaton, 824; 3 B. & Ald. 1-9; 1 Buls. 38; 2 T. R. 110.

E. S. DARGAN, GEORGE GOLDTHWAITE, and JOHN HALL, *contra*.—1. The act of 1852, “to extend the charter of the Mobile Bank,” whether considered as a contract or as a statute, applies only to loans and discounts made under the new or extended charter, and does not repeal or modify any powers or privileges conferred on the bank by the old charter. If A. leases lands to B. for a term of years, with certain privileges, and afterwards renews or extends the lease before its expiration, with the proviso or condition that B. shall not enjoy some one or more of the privileges granted by the first lease; it is clear that such proviso or condition would be confined in its operation to the new lease, and could not, in the absence of express words or necessary implication, be referred to the

old lease. So, here, the act of 1852 extends the old contract with the bank for the term of twenty years after its expiration, and annexes three conditions to the extended charter—that the bank must not charge more than six per cent. on its loans and discounts, that it must receive and pay out the revenue of the city and county of Mobile free of charge, and that it must pay a bonus to the State of \$100,000 in sums of not less than \$5,000 per annum. This is a new contract between the parties, the subject of which is the renewal or extension of the bank charter from 1859 for twenty years; and the conditions or stipulations of such contract cannot, on any known principle, be allowed to affect rights acquired under the old.

2. Considered merely as a statute, the act of 1852 must receive the same construction. A proviso to a statute naturally refers to the subject or matter which precedes it, and its appropriate office is to qualify or abridge that matter.—*Rawls v. Kennedy*, 23 Ala. 248. The matter which here precedes the proviso relates solely to the powers of the bank after the expiration of the old charter: it is a grant of powers to commence at a fixed future day; and the proviso comes in to qualify or abridge this grant. Any other construction of the act would make it operate, by implication, a partial repeal of the former statute, when no such intention is manifested by its terms, and the two acts may both stand together.—*Crabbe*, 356; 13 Amer. Digest, 595, § 34; *George v. Skeates*, 19 Ala. 742; *White v. Johnson*, 23 Miss. (1 Cush.) 68; *The State v. Woodside*, 9 Indiana, 496; *Williams v. Potter*, 2 Barbour, 316; 3 Gill, 138; *People v. Oakland Bank*, 1 Doug. 282; *Planters' Bank v. The State*, 6 Sm. & Mar. 628; *Kinney v. Mallory*, 3 Ala. 626; 5 Hill, 221; *Ludlow v. Johnson*, 3 Ham. 553; *Sedgwick on Statutes*, 123–27.

3. If the act of 1852 applies to the contract by which the plaintiff obtained the note here sued on, it does not render the contract void, but only abates the interest on account of the usury. There is a difference between an entire want of capacity to make a contract, and a mere restriction of the exercise of such capacity.—*Grand Gulf Bank v. Archer*, 8 Sm. & Mar. 151, and cases therein

referred to from 4 Sm. & Mar. and 7 Howard; also, Phil. Loan Co. v Towner, 13 Conn. 249; United States Bank v. Wagner, 9 Peters, 378. The case of Owen v. United States Bank, 2 Peters, in which this distinction was lost sight of, is, in effect, overruled in the case of Thornton v. Bank of Washington, 3 Peters, 42; and the decision was materially shaken on a second appeal, as reported in 9 Peters. See, also, 13 Sm. & Mar. 411; 3 Randolph, 136.

4. The charter of the bank conferred on it a summary remedy, by notice and motion, for the collection of its debts. That remedy was continued in force by the act of 1834, and is not affected by any general statute since enacted.

RICE, C. J.—The term of the original charter of the Bank of Mobile expired, by its own limitation, on the 1st day of January, 1839. Before its expiration, and in 1834, an act was passed by the legislature, whereby the term of the original charter, and the powers, rights, privileges and immunities thereby granted, were continued and extended, from and after the 1st day of January, 1839, until the 1st day of January, 1859, and whereby the Bank was authorized (among other things) to take and receive upon promissory notes made negotiable and payable at any bank within the city of Mobile, after six, and not having more than nine months to run, at a rate of interest not exceeding seven per centum per annum.—Clay's Digest, pp. 124–130.

In 1852, the legislature passed another act, entitled, "*An act to extend the charter of the Mobile Bank,*" which is in the following words: (See foregoing statement of facts.)

The most important question in this case is, whether the act of 1852, even if accepted by the bank before 1857, deprived the bank of the right, granted to it by the charter of 1834, to discount in 1857 such a note as is here sued on, at the rate of seven per cent. per annum. The determination of that question depends entirely upon the nature and meaning of the proviso contained in the 1st section of the act of 1852.

“The proviso is generally intended *to restrain the enacting clause, and to except something which would otherwise have been within it*, or, in some measure, to modify the enacting clause.”—Wayman v. Southard, 10 Wheaton, 30. “The natural and appropriate office of a proviso is, to restrain or qualify some preceding matter,” and the proviso should be “*confined to what precedes*, unless it is clear that it was intended to apply” to some other matter.—Rawls v. Doe *ex dem.* Kennedy, 23 Ala. R. 248; Smith on Stat. and Const. Law, § 758; Sedgwick on Stat. and Const. Law, p. 62; Vorhees v. Bank of U. S., 10 Peters, 449.

The act of 1834, as a legislative charter to a corporation, was a contract of inviolable obligation, which could not constitutionally be impaired by the legislature, without the assent of the corporation.—Bank of the State v. Bank of Cape Fear, 13 Iredell, 75. By that charter, the right to discount all such notes as that here sued on, at seven per cent. per annum, was inviolably secured to the bank, *until the 1st day of January, 1859*, the expiration of the charter. There is nothing in the act of 1852 which shows an intention to require the bank to surrender, or to consent to surrender, *before the expiration of the charter of 1834*, any right secured by that charter. “The powers, privileges and capacities” of the bank, which are extended by the act of 1852, are extended “*from the expiration*” of the charter of 1834, leaving that charter wholly untouched in its duration. And the restraint which was intended by the proviso, as to six per cent. interest, seems to us to be clearly a restraint upon *the extended* powers, privileges and capacities, and not upon the powers, privileges and capacities, which belonged to the bank at and before the passage of the act of 1852. By confining, as we do, the proviso as to six per cent. interest to what precedes it in the act of 1852, we allow it to perform its natural and appropriate office, and to operate as a restraint upon the powers, privileges and capacities which were derived from the act of 1852, and which, but for that act, would not have belonged to the bank.

The *special* provision in the charter, allowing the proceeding by notice and motion, for the collection of such

a debt as that here sued on, is not affected by any subsequent *general* law.—*Mobile & Ohio R. R. Co. v. The State*, 29 Ala. Rep. 573; *Daughdrill v. The Ala. Life Ins. and Trust Co.*, 31 Ala. Rep. 91; *May v. Robertson*, 13 Ala. Rep. 86.

Upon an examination of the whole record, we find no reversible error, and therefore affirm the judgment.

:
NOTE BY REPORTER.—After the delivery of the foregoing opinion, the appellant's counsel filed an application for a rehearing; in response to which, on a subsequent day of the term, the following opinion was pronounced:

A. J. WALKER, C. J.—The petition for a rehearing presents in a forcible manner some arguments opposed to the affirmance of the judgment of the court below, which are not noticed in the opinion prepared by the late chief justice.

The act to extend the charter of the Bank of Mobile contains two provisoes, placed in juxtaposition, which are as follows: "*Provided*, that the said bank shall, in no case, charge more than six per cent. per annum on its loans or discounts, except in cases of settlement made to secure and doubtful debts; *and provided further*, that the said bank shall receive on deposit the funds of the county or city of Mobile, and pay out the same in such amounts as may be drawn for, for which it shall receive no compensation."—Pamphlet Acts of '51 and '52, p. 104. On the same day with the act to extend the bank charter, another act was approved, which made it the duty of the bank to receive on deposit and pay out the funds of the city and county of Mobile.—Pamphlet Acts of '51 and '52, page 470. It is clearly indicated in this latter act, that it was designed to become operative, at the farthest, on the first of April next after its adoption, and before the expiration of the old charter, or the commencement of the extended period. It is contended, that this latter statute is a cotemporaneous legislative construction of the second proviso, and clearly indicates an intent that it should have a present operation. The inference is then drawn,

that the legislature designed that the first proviso should also have a present operation, because it is supposed that the two provisos must have a like interpretation as to that point.

We do not consider, whether the second proviso should be understood as is contended; but we are unable to attain the conclusion, that the same time for the commencement of the first proviso, as of the second, must necessarily be adopted. There are reasons, opposed to the allowance of an immediate operation to the first proviso, which can not apply to the second. The restriction of the bank to six per cent. on its loans and discounts is, in its nature, a qualification of the powers previously conferred. The extension "of the powers, privileges and capacities" of the corporation, bestowed the privilege of making loans and discounts; and the proviso, immediately following, would seem naturally to qualify that privilege. It is different, in that respect, from the proviso in reference to the gratuitous receiving on deposit and paying out the money of the city and county of Mobile. That proviso is not of such a nature as to qualify any of the acts which the bank is authorized to perform. It does not, like the first proviso, pertain to the manner in which any of the granted privileges are to be exercised. It rather imposes a burden, as a part of the price in consideration of which the extension of the period of the franchise was granted. There is nothing in its nature which interferes with the allowance to it of a present operation.

These two provisos differ from each other in another essential particular. The second proviso could have immediate effect, without the abrogation or repeal of any clause of the previous acts chartering and extending the charter of the bank. The first proviso could not operate before the extended period of the franchise, without a repeal of the clause in the charter prescribing the rate of interest. To give the first proviso immediate effect, it must not only be regarded as qualifying the privileges granted by the act, but as repealing a pre-existing law. Regarded in that light, the first proviso would have an

operation not authorized by its language, and certainly not justified by the authorities which define the scope and effect of a proviso, several of which are collected in our former opinion in this case. It is an established principle, that a later statute shall not repeal an older one by implication, unless they are so inconsistent that they can not stand together.—*Rawls v. Kennedy*, 23 Ala. 240; *George v. Skeates*, 19 Ala. 738. The proviso now under consideration is not so inconsistent with the previous act, prescribing to the bank the rate of interest to be charged, that the two can not stand together. On the contrary, a perfect harmony between the two is preserved, by giving the former effect upon the expiration of the period appointed for the operation of the latter. We think it follows from what we have said, that the giving of immediate operation to the first proviso would involve the repeal by implication of a previous statute, while no such consequence would attend the allowance of an immediate operation to the second proviso.

For the reasons above set forth, even it be conceded that we have a legislative construction of the second proviso, which gives it a present force, we should not deem it our duty to place the same construction upon the first proviso.

On the 6th February, 1858, an act was passed, amending the first proviso, and modifying the restriction as to the rate of interest. We do not find in this act any evidence that the legislature regarded the first proviso to the act extending the charter of the bank as having any operation before the commencement of the period of extension. The language and the purpose of the act consist as well with the supposition that the proviso did not have, as that it did have a present operation.

The petition for a rehearing is overruled.

SMITH vs. HARRISON.

[ACTION ON PROMISSORY NOTE BY ENDORSEE AGAINST MAKER.]

1. *Right of subrogation not enforced by action at law.*—If a surety or endorser pays off a judgment recovered against him, after the return of “no property found” on a judgment previously recovered against his principal, the right of subrogation thereby accruing to him cannot be enforced in an action at law.
2. *Who is proper party plaintiff.*—A judgment is not a “contract, express or implied, for the payment of money,” within the meaning of section 2129 of the Code.
3. *Form and sufficiency of complaint.*—A complaint which avers the making of a promissory note by the defendant, its endorsement by the payee, the recovery of a judgment thereon by the endorsee against the maker, the issue of an execution thereon and its return “no property found,” the subsequent recovery of a judgment against the endorser, its satisfaction by him, and the transfer by him to plaintiff “of said claim against defendant,” is a good and sufficient complaint on the note.
4. *Plea of statute of limitations of six years.*—To such a complaint, the statute of limitations of six years presents a good defense.
5. *Plea denying endorsement.*—In an action by the endorsee or transferee, against the maker of a promissory note, the endorsement or transfer can only be denied by a sworn plea.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

The complaint in this case was in these words:

“Richard K. Harrison, plaintiff, claims of the defendant, Bolling Smith, who is brought into court by attachment, the sum of two thousand dollars as damages, for that whereas, heretofore, to-wit, on the 20th May, 1838, the defendant made his promissory note, bearing date the said 20th May, 1838, whereby the said defendant promised, on the first day of January next after the date thereof, to pay one John J. Scott or order the sum of two hundred and seventy-five dollars, and then and there delivered said promissory note to said Scott; and plaintiff avers, that afterwards, to-wit, on the 2d September, 1839, the said Scott endorsed said promissory note to one John G. Maull; that said Maull afterwards brought suit, for

the use of one William P. Givhan, against said defendant, to the fall term, 1839, of the circuit court of Antauga county, in which county the said defendant then resided; that afterwards, to-wit, at the spring term of said court, 1840, the plaintiff in said suit recovered a judgment therein against the said defendant, for the sum of three hundred and three dollars, besides costs of suit; that afterwards, to-wit, on the 22d of April, 1840, a *fiery facias* was issued on said judgment, and was delivered to the sheriff of said county; that afterwards, upon the return day of said *fiery facias*, the said sheriff returned upon the same that he could not find property of the defendant to make the money thereon; that afterwards, to-wit, on the 20th January, 1841, said John G. Maull, for the use of William P. Givhan, sued the said John J. Scott upon said promissory note, and upon his endorsement thereof, to the spring term, 1841, of the circuit court of Lowndes county; that afterwards, to-wit, at the fall term, 1841, of said circuit court of Lowndes, the said John G. Maull, for the use of William P. Givhan, recovered a judgment against said Scott in said suit, for the sum of three hundred and thirty-six 85-100 dollars; that afterwards, to-wit, in January, 1842, said Scott paid and satisfied said judgment; that the said defendant never having paid the said Scott the said sum of money so by him paid upon the last named judgment, and upon his said endorsement, the said Scott transferred said claim against said defendant to this plaintiff, to-wit, before the commencement of this suit, and he is now the owner thereof; wherefore plaintiff claims of said defendant the damages aforesaid."

The defendant demurred to the complaint, on the following specified grounds: "1st, that the complaint shows that there is now an unsatisfied judgment against said defendant, in the circuit court of Antauga county, on the note described in said complaint; 2d, (in addition to the above,) that said complaint does not show that said judgment has not been annulled or reversed, and is still in force and effect; 3d, (in addition to the above,) because the complaint does not show that said defendant had any notice of said judgment against said Scott, and of its pay-

ment and satisfaction by said Scott; 4th, because said complaint does not show that ten years have now expired between the return of the execution on said judgment against this defendant and the commencement of the present action; and, 5th, because by the proceedings the action should have been on the judgment against the defendant, which is not the case." The court overruled the demurrer, and the defendant then filed ten pleas; the first, second, third, fourth, fifth and sixth pleas setting up, in different forms, the statutes of limitation of three and six years, and the others being as follows: "7th, that there never was any judgment against said defendant in Autauga county; 8th, that the judgment in Autauga county, as described in the complaint, was satisfied by defendant before suit; 9th, that Scott never did pay the judgment against him described in the complaint; 10th, Scott never did transfer said claim to plaintiff, as described in said complaint." The plaintiff demurred to all of these pleas, except the 7th, 8th and 9th, on which he joined issue; and the court sustained the demurrer. The record does not show what causes of demurrer, if any, were specified.

The errors now assigned are, the overruling of the demurrer to the complaint, the sustaining of the demurrers to the several pleas, and other rulings of the court to which exceptions were reserved on the trial.

THOS. WILLIAMS, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

STONE, J.—The complaint in this case does not claim that Scott, the payee of the note, ever acquired any interest in the judgment recovered in the circuit court of Autauga, in favor of Maull, for the use of Givhan, by virtue of any contract, or assignment of that judgment to him. The only right he asserts is that which, by operation of law, springs out of the payment by him of the judgment recovered on his endorsement. The present plaintiff claims that Scott transferred the said claim against the said Bolling Smith to him. This amounts to

nothing more than a statement that Harrison has succeeded to all the right in said claim, which Scott had previously owned.

This, then, being the extent of the claim to the judgment asserted by Harrison, it results that, independent of the provisions of the Code, he could only claim to be subrogated to the rights which Maull, to the use of Givhan, had acquired against Smith by virtue of that judgment. Subrogation is a doctrine of the court of chancery, and can not be enforced in a court of law.—See *White & Tudor's Leading Cases in Equity*, 65 Law Library, 91-3; *Houston v. Br. Bank*, 25 Ala. 250; *Lamkin v. Phillips*, 9 Porter, 98; *Lyon v. Bolling*, 9 Ala. 463; *Knox v. Abercrombie*, 11 Ala. 997; *Hogan v. Reynolds*, 21 Ala. 56; *Bartlett v. McRae*, 4 Ala. 688.

By section 2129 of the Code, it was not intended to obliterate the distinction between common-law and equity jurisdiction.—See *Pickens v. Oliver*, 29 Ala. 528-35. True, it authorizes a party who is really interested in a promissory note, bond, or other contract for the payment of money, express or implied, although he has not the legal title to the same, to maintain an action thereon in his own name. We have no authority to extend its provisions, so as to take in matters of contest and litigation, which before its enactment were cognizable exclusively in courts of equity.

Having attained these conclusions, we might content ourselves with the declaration, that the complaint in this record fails to show that the plaintiff is "the party really interested" in the judgment, in the sense in which the Code employs that term. We prefer, however, to place our opinion on a different principle.

[2.] There are authorities which hold that a judgment is a contract:—2 Bla. Com. 465; *McGuire v. Gallagher*, 2 Sandf. Sup. 402; *Dobson v. Pearce*, 1 Abb. Pr. Rep. 97; *Martin v. Kenara*, 11 How. Pr. Rep. 567; *Cameron v. Young*, 6 How. Pr. Rep. 372; *Dobson v. Pearce*, 1 Duer, 142; *Ivey v. Martin*, 2 Duer, 654.

Mr. Addison, in his work on contracts, says: "Contracts by matter of record are contracts acknowledged in open

court before an officer of the court, and recorded in the presence of the party making the acknowledgment. * * Contracts by statutes merchant and statutes staple are contracts of record," &c.—Addison on Contracts, 2.

In *Keith v. Estill*, 9 Porter, 669, this court, in construing another statute, said: "Although the word *contract* may, in its most enlarged sense, include a legal liability arising on a judgment, from which the law implies a contract or promise to pay; yet it must be conceded, that this is a very recondite and remote sense of the term, and very far removed from its popular signification." It was ruled, that the term *contract* in that statute did not include a judgment.

So, under section 2129 of the Code, we hold that judgments are not included in the term, "*other contract, express or implied, for the payment of money.*" To hold otherwise, would probably lead to embarrassments in proceedings in garnishment, trials of the right to property, &c.

[3. The complaint in this case is, then, a complaint on the promissory note, the right to which had reverted in Scott on his payment of the judgment rendered on his endorsement. The recovery of the several judgments, and the payment of the latter, were but links in the chain of facts which supported the plaintiff's action—necessary to be averred and proved; but the cause of action stated in the complaint is the note of Smith, not the judgment which Maull for the use of Givhan recovered upon it.

[4.] The plea of the statute of limitations of six years was a good and valid defense to the plaintiff's complaint, and the circuit court erred in sustaining the demurrer to it.

[5.] The tenth plea was worthless, without an affidavit of its truth.—Rule of practice adopted January term, 1853, rule book, p. 3.

Judgment of the circuit court reversed, and cause remanded.

MCCOLLUM vs. MCCOLLUM'S EXECUTOR.

[PETITION FOR SALE OF PERSONAL PROPERTY OF DECEDENT'S ESTATE.]

1. *Sufficiency of appeal bond as security for costs.*—A bond, conditioned as *supersedeas* bonds usually are, is a sufficient security for the costs of an appeal, (Code, § 3041,) although the decree appealed from is one which cannot be superseded.
2. *Jurisdiction of probate court to order sale of decedent's personal estate.*—Under the act of 1854, (Session Acts 1853-4, p. 45,) the probate court has no authority to order the sale of a decedent's personal estate, for the purpose of making distribution, when that power is vested in the executor by the will.
3. *Executor's authority to sell property.*—Where the testator's will directs all his property, both real and personal, to be "valued by three disinterested men, and divided or sold," and the proceeds of sale to be distributed among the legatees, but does not designate the person by whom the sale is to be made, the executor has the power to sell.

APPEAL from the Probate Court of Fayette.

IN the matter of the estate of Newman McCollum, deceased, on the application of the executor, Joseph McCollum, for an order to sell the perishable property for the purpose of making distribution among the parties interested. The testator's will, which was duly admitted to probate in March, 1858, contained a clause in these words: "I desire all my lands and negroes to be valued by three disinterested men as cash, with the future increase of the negro women, if any, all my household furniture, and all my perishable property, to be valued and divided, or sold, and the money divided into four parts," &c., and to be distributed among the persons named. The application was contested by one of the legatees and heirs-at-law, but was granted by the court; and no exception was reserved to the ruling. It is now assigned as error, that the probate court had no jurisdiction to grant the order of sale.

The appellee submitted a motion to dismiss the appeal, on the ground that the appeal bond could not operate as a *supersedeas*, because the decree was one which could not

be superseded; and that it was not a sufficient security for the costs, because the condition was not general enough to cover all the costs that might be incurred. The bond purported to supersede the decree, and was conditioned that the appellant "shall prosecute said appeal to effect, and pay and satisfy such judgment as the supreme court may render in the premises."

E. W. PECK, for the appellant.

VAN HOOSE & POWELL, *contra*.

R. W. WALKER, J.—Under the authority of the decision in the case of Walker v. Hunter, at the present term, we must consider the appeal bond found in this record as a sufficient security for the costs; and the motion to dismiss the appeal is therefore overruled.

[2.] The act of February 16, 1854, (Session Acts '53 and '54, p. 45,) invests the probate court with authority to order the sale of the personal estate of a decedent, to make distribution among the legatees or distributees, "unless power is conferred by the will to sell such property for that purpose." The jurisdiction of the court is thus made to depend on the fact, that under the will the executor has no power to sell such property for the purpose of division among the legatees.

[3.] In the present case, the testator directs all his property, lands, negroes, &c., to be valued by three disinterested men, and divided, or sold, and the money distributed among the legatees. A power to sell the slaves, and distribute the proceeds, is here conferred; and although the executor is not expressly designated as the donee of the power, it devolves upon him by necessary implication. For, wherever such a power is given by will, the law casts it upon the person who is appointed by the testator to execute the will, unless it is specially delegated to another.—4 Kent, 327; 1 Sugden on Powers, 167, 172. It follows that the court had no jurisdiction to make the order in this case.

The decree is reversed, and the cause remanded, with directions to the probate court to dismiss the proceeding.

COX, BRAINARD & CO. vs. FOSCUE.

[ACTION AGAINST OWNERS OF STEAMBOAT FOR NEGLIGENCE.]

1. *Liability of steamboat-men, as common carriers, in matter of transhipment of freight.*

If goods are properly transhipped from one boat to another, under circumstances which justify such transhipment, it is not the duty of the first boat to take them on board again after the immediate risk or danger is past; nor are the owners of that boat liable for the subsequent loss of the goods on the other boat, although they could have received them again on their own boat after the danger which caused the transhipment was past.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by F. F. Foscue against the appellants, as common carriers, to recover damages for the loss of two bales of cotton, which were shipped on board of the steamboat *Eliza Battle*, of which boat the defendants were the owners, consigned to Goode & Ulrick at Mobile, but never delivered. The only plea was the general issue. The facts disclosed on the trial, as stated in the bill of exceptions, were substantially as follows: The bill of lading for the plaintiff's cotton contained the usual exceptions as to "dangers of the river and fire." While the *Eliza Battle* was proceeding down the river, after shipment of plaintiff's cotton, she ran aground; and while in this condition, a part of her cargo, including the plaintiff's cotton, was transferred to the steamer *Jennie Bealle*, which passed the other boat while aground. The *Eliza Battle* was got off by thus lightening her, and continued on her way down the river, without taking back any of her cargo from the *Jennie Bealle*, although the witnesses thought she might safely have retaken the cotton. The *Jennie Bealle* afterwards ran aground, and was lightened in like manner by transferring the cotton to the steamboat *Sallie Spann*; and the latter boat, with all her cargo, was afterwards destroyed by accidental fire.

"The court charged the jury, among other things,—

"1. That in case of grounding, if the grounding was by reason of any negligence of the defendants, they would be responsible for all the consequences of the transshipment and loss, if occurring by reason of the transshipment.

"2. That if the grounding was not by negligence, then, if it became necessary to lighten the *Eliza Battle* in order to get her off, their first duty would be to land the cotton, if practicable, and take it on again after she got off and continued on her voyage.

"3. That if this could not conveniently be done, then it was proper to put it on another steamer, to lighten the *Eliza Battle* and save her from destruction; but, if the jury believed that, by being so lightened, the *Eliza Battle* got afloat again, and, directly after she got afloat, could have taken the transhipped cotton back again, it was her duty to do so; and if she could have done it, but did not, the defendants would be liable for the cotton, if burned on the *Sallie Spann*: that the exemption from loss by fire did not extend to the cotton on the *Sallie Spann*, but, in such case, only on the *Eliza Battle*."

The third charge, to which the defendants below excepted, is the only matter now assigned as error.

GEO. N. STEWART, for the appellants, cited the following authorities: Parsons' Mercantile Law, 349, and notes; 4 Johns. Ch. 218; Angell on Carriers, § 187; 1 Arnould on Insurance, 184; Abbott on Shipping, m. p. 365, and notes on p. 450; Flanders on Shipping, §§ 237, 240, 242, 244, 245, 257; 2 Kent's Com. 468; 15 Wendell, 474; 17 Howard's (U. S.) Rep. 109; 19 *ib.* 166.

WM. BOYLES, and THOS. H. HERNDON, *contra*, cited Abbott on Shipping, 451; 1 Arnould on Ins., 181; Law Register for June, 1857, p. 459; 9 Ad. & El. 314; 5 Barn. & Ald. 19, 123; 6 Pick. 141; 7 Eng. Law & Eq. R. 467; 8 Watts & Serg. 44; 6 Ohio, 359; 2 Scam. (Ill.) 288; 1 B. Monroe, 339; 5 Johns. 362; 8 Missouri, 99; 7 Howard, (U. S.) 586; 13 Mees. & W. 236; 12 East, 381; 11 C. B. Rep. 176-88.

RICE, C. J.—On the trial in the court below, there was evidence tending to show that, whilst the steamboat *Eliza Battle* was descending the Tombeckbe river, having on board the plaintiff's cotton, destined for Mobile, the voyage was interrupted by "the grounding" of the boat, without any negligence whatever; that whilst she was aground, and in a position of peril, another steamboat, called the *Jennie Bealle*, equally well fitted for carrying the cotton to its destination, and then on the way to Mobile, and not near loaded, came down the said river, and, without grounding, passed the *Eliza Battle*, and stopped; that about one hundred and ten bales of cotton, including the plaintiff's cotton, were then transhipped from the *Eliza Battle* to the *Jennie Bealle*; that after receiving this cotton, the *Jennie Bealle* did not have as much, by several hundred bales, as she was capable of carrying; and that by the transhipment the *Eliza Battle* got afloat. The circumstances which induced and attended the transhipment are detailed in the record, but need not here be stated. It is enough to say, that they tended to prove that the transhipment was justifiable.

The court gave three charges, to the third of which only exception was taken. The first and second charges will not, therefore, be considered by us, for any other purpose than to enable us to understand more fully the import of the third charge. Construing that charge in connection with the 1st and 2d charges, and with the evidence, we understand the court therein to assert as law the following proposition, to-wit, that although the transhipment of the cotton from the *Eliza Battle* to the *Jennie Bealle* "was proper"; yet, if thereby the *Eliza Battle* "got off and afloat again," and if directly after she got afloat she *could have taken back* the cotton "transhipped," it was her *duty* to do so; "and if she *could* have done it, and did not, the defendants would be liable for the cotton, if burned on the *Sallie Spann*."

It strikes us that the foregoing proposition, asserted by the court below, is founded upon a misconception of the nature and legal effect of a "proper" transhipment—that is, of a transhipment which the law would sanction as one

authorized by the circumstances. Such a transshipment discharges the obligation of the master of the vessel making it, to carry the goods to their destination in his own vessel, and gives rise to new rights and new liabilities on the part of the master and owners of the vessel to which the goods are transferred by the transshipment. After such transshipment, and the springing up of such new rights and new liabilities, and the discharge of the obligation of the master of the vessel making the transshipment, it is not his *duty* to take back the goods which he has properly transhipped, nor to revive the obligation which has been discharged, to carry them to their destination on his own vessel. Nor is he, or the owners of that vessel, liable for the subsequent destruction of the goods on another vessel, upon the mere ground that he did not take them back on his own vessel after he had *properly* transhipped them: On the contrary, the true principles applicable to such a case may easily be collected from the following extracts from high authority: "Transshipment, for the place of destination, if it be practicable, is the *first* object, because that is in furtherance of the original purpose; if that be impracticable, return, or a safe deposit, may be expedient."

* * "If on the high seas the ship be in imminent danger of sinking, and another ship, apparently of sufficient ability, be passing by, the master may remove the cargo into such ship; and although his own ship happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss." * * "If, by any disaster happening in the course of his voyage, he is unable to carry the goods to the place of destination, or to deliver them there," * * * "in general, it may be said he is to do that which a wise and prudent man will think most conducive to the benefit of all concerned."

Abbott on Shipping, marg. pages 365 to 370, and the notes by Mr. Justice Story, and J. C. Perkins, Esq.; Jordan v. Warren Ins. Co., 1 Story's C. C. Rep. 342; Flanders on Shipping, pp. 190 to 193, 245, 248; The Grati-tudine, 3 Rob. (Eng. Adm.) R. 240; Lawrence v. Min-turn, 17 How. (U. S.) Rep. 100, 110.

The third charge of the court below is too exacting. It

denies the discretion and right to the master accorded to him by law. It is not defensible upon principle or authority. For the error in giving that charge, the judgment of the court below is reversed, and the cause remanded.

Per Curiam. (March 9, 1859.) The foregoing opinion, prepared by the late chief-justice, is adopted as the opinion of the present court.

ROSE vs. GRIFFIN.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Indian reservations under the treaty of 1832 with the Creek Indians.*—Under the treaty of 1832, between the United States and the Creek Indians, the title to all the Creek lands was ceded to the United States, and the reservations to the heads of families were of an estate for five years only, to be enlarged into a fee, at the expiration of that time, on the happening of the contingencies provided for in the treaty. (Overruling *dicta*, to the effect that the reservee took a defeasible fee, in *Wells v. Thompson*, 13 Ala. 793; *Corprew v. Arthur*, 15 Ala. 525; and *Rowland & Heifner v. Ladiga*, 21 Ala. 9.)
2. *Validity of patent.*—A patent from the United States government, which recites that a Creek Indian “became entitled” to the land under the provisions of the treaty of 1832, and that the land was afterwards sold under the provisions of the act of congress of March 3, 1837, authorizing the sale by the government of unsold reservations, cannot be pronounced void on its face.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. WILLIAM M. BROOKS.

THIS action was brought by Howell Rose, against Martha M. and Bennett S. Griffin, to recover “the south half of section three, in township nineteen, range nineteen, in the Tallapoosa land-district,” together with damages for its detention. The defendants pleaded not guilty, and made the statutory suggestion as to the erection of valuable improvements under adverse possession for three

years. The plaintiff claimed the land under a patent from the United States, dated the 30th June, 1856, signed by the president, and duly executed, which was in these words:

“The United States of America,

“To all to whom these presents shall come, greeting:

“Whereas, Co-e-jus-hadjo, one of the Creek tribe of Indians, by virtue of a treaty between the United States and the said Creek tribe of Indians, made the 24th day of March, 1832, became entitled, out of the lands ceded to the United States by the said treaty, to the south half of section three, in township nineteen, of range nineteen, east, in the district of lands subject to sale in Montgomery, Alabama, containing three hundred and nineteen 72-100 acres, according to the official plat of the survey of the said lands returned to the general land-office by the surveyor-general; and whereas, pursuant to the provisions of the act of congress approved March 3, 1837, entitled ‘An act to authorize and sanction the sales of reserves provided for Creek Indians in the treaty of March 24, 1832, in certain cases, and for other purposes,’ the said tract was sold on the 6th day of May, 1856, to Howell Rose, as appears from an official return, dated June 7, 1856, from the office of Indian affairs to the general land-office: Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the provisions of the said act, have given and granted, and by these presents do give and grant, unto the said Howell Rose, and to his heirs, the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Howell Rose, and his heirs and assigns forever. In testimony whereof,” &c.

The court charged the jury, that this patent “was void on its face, and conferred no title on the plaintiff to the land in controversy;” to which charge the plaintiff excepted, and which he now assigns as error, having been thereby compelled to take a nonsuit.

L. E. PARSONS, for the appellant, made these points:

1. At the time the treaty of 1832 was made, the title to all the Creek lands was in the nation. Each individual had the right to occupy, use and enjoy, but had no title to any separate and distinct portion of the land. By the treaty, the United States acquired the legal title to all the lands, and agreed to allow the principal chiefs and heads of families to make certain selections; which selections, the second article of the treaty provided, "shall be reserved from sale, for their use, for the term of five years, unless sooner disposed of." It was the policy of the United States, and their expressed wish as declared in the treaty, that the Indians should remove to the country west of the Mississippi; but no force or compulsion was to be exercised to effect their removal. In furtherance of this policy, the United States engaged that said selected lands should be reserved from sale for five years, unless sooner disposed of by the Indians themselves. During this period of five years, the United States could not dispose of these reservations; the Indians could, but only in the manner pointed out in the treaty. At the expiration of the five years, if the Indian had not sold, and was desirous of remaining, he had a right to a patent for his reservation in fee-simple.

2. The plaintiff's patent shows, that Co-e-jus-hadjo "became entitled" to the land in controversy under the provisions of the treaty, and that the land was afterwards sold under the provisions of the act of 1837. But there is nothing in the recitals of the patent to show that he was desirous of remaining at the expiration of the five years; and that is the only fact which could interfere with the right of the United States to sell and convey the land. The court will take judicial notice of the fact, that the Creek Indians, as a tribe, did remove west of the Mississippi river, in accordance with the policy declared in the treaty; but it cannot judicially know whether their removal was voluntary or compulsory, which is a doubtful question of fact; nor whether Co-e-jus-hadjo, in determining the question of removal for himself, desired to remain; nor whether he was even alive at that time; nor

whether, if dead, he left heirs on whom his rights, whatever they were, might descend. Unless the court can judicially know that he was alive at the expiration of the five years, and desired to remain, it cannot declare the plaintiff's patent void on its face.

GOLDTHWAITE & SEMPLE, on the same side.—The validity of the patent depends on the question, whether the United States had title to the land at the time it was issued; a question which involves the construction of the treaty with the Creek Indians of March 24, 1832. If the question could be regarded as an open one, we should insist, that the intention of the treaty was to preserve the fee to the lands in the United States, until the issue of a patent after the expiration of five years. This construction is obvious from the language of the instrument itself, the words used being such as repel the idea of grant.—*Wilcox v. Jackson*, 13 Peters, 498, 516. The provision in the second article, stipulating that the selected lands "shall be reserved from sale" for five years; the provision in the third article, stipulating that a title "shall be given" by the United States in cases of approved sales; and the provision of the fourth article, stipulating that patents in fee-simple shall be issued by the United States, at the expiration of the five years, to those reservees who might desire to remain,—are inconsistent with the idea of a present grant. On this question, see the reasoning of Judge Hopkins, in *Chinnubbee v. Nicks*, 3 Porter, 362. This question, however, is conclusively settled by the decisions in the cases of *Ladiga v. Roland*, 2 Howard, 581; *Rowland & Heifner v. Ladiga*, 21 Ala. 9.

Conceding that the treaty, *per se*, operates by way of grant, the question is as to the character and extent of the grant. For the appellant it is insisted, that the estate taken by the reservee is the use of the land for five years, with a conditional power of sale during that time; which estate is to be enlarged into a fee, at the expiration of the five years, if the land is then unsold, and the reservee is desirous of remaining. The fee does not vest in the reservee, unless and until these conditions are fulfilled or

excused. The grant of the fee is upon condition precedent, expressed in the grant.—3 Bla. Com. 88; 4 Kent's Com. (8th ed.) 124–5. The expression used by the court in the cases of Wells v. Thompson, (13 Ala. 793,) Corprew v. Arthur, (15 Ala. 525,) and Rowland & Heifner v. Ladiga, (21 Ala. 9,) characterizing the estate as “a defeasible fee,” or an estate upon condition subsequent, are inaccurate, and amount to nothing more than *dicta*. In each of these cases, the same result would have been attained, whether the condition annexed to the estate was precedent or subsequent.

If the treaty operates as a grant from the United States upon condition precedent, it would devolve on the grantee, in an action by the grantor, to prove the performance of the condition on which his estate was to vest. The plaintiff here succeeds, by virtue of the patent, to all the rights of the grantor, and could recover against the grantee unless performance of the condition is shown; *a fortiori*, may he recover against a stranger.

N. S. GRAHAM, with whom was JNO. T. MORGAN, *contra*. All the treaties between the United States and the Indians, from the year 1790, and all the acts of congress in connection therewith, from the act of May 19, 1796, down to the act of March 3, 1837, under which the plaintiff's patent was issued, in connection with the history of the action of the United States government towards the Creek Indians, conclusively show that the United States, in all the departments of the government, legislative, executive and judicial, have admitted the right of the Indians to attach to the soil, and not to be taken from them without their consent and on valuable consideration. By all the treaties made with the Creeks, prior to that of 1832, the title to the lands was regarded as being in the tribe as a nation, contradistinguished from the idea that any individual of the tribe had any special title to any particular tract; and the United States guarantied the integrity of the territory to the tribe as a nation. The treaty of 1832 made the first clear and distinct advance towards localizing and individualizing the tract of the individual

Indian, as distinguished from the nation in its aggregate capacity. It inaugurated the great feature of civilization and christianity, of giving to individual rights the strong arm of government as a shield against lawless aggression; of identifying the locality of the individual, and associating his name with his place; thus clustering his affections about his corn-patch and hearth-stone, and making his house a castle of defense. This is the great and distinguishing feature of the treaty of 1832.

While it may be conceded that, by the first article of the treaty of 1832, the Creek tribe of Indians ceded all their lands to the United States; yet this cession of the nation as such was upon the express condition, contained in the second article, that the United States engaged to survey the lands as soon as convenient, (thus rendering it capable of being individualized,) and, after the completion of the survey, to allow ninety principal chiefs to select, &c. The first clause is not binding on the Indians, unless the second is binding on the United States; the first does not operate a present grant of the title to the United States, unless the second operates a grant of the reserved lands to the individuals by whom they were to be selected; for treaties are reciprocal.—Vattel, book 2, p. 214. It is this act of selecting and setting apart from the aggregate territory of the tribe, this isolating, disintegrating process, which individualizes the tract in connection with the reservee; which gives the individual Indian “a title perfect and indefeasible,” not only against the Creek nation, but against the United States; which cut him off from the war-path, clothes him with the garments of civilization, lures him from the forests and jungles of the roaming hunter, and leads him quietly into the peaceful pursuits of agriculture and the arts.

“Under the provisions of the treaty with the Creek tribe of Indians on the 24th March, 1832, we hold that the title of the Indian reservee, is a legal title, capable of sustaining an action of ejectment; that being located upon his reserve, and neither selling nor abandoning, his title became perfect and indefeasible, and descended to his heirs.”—Rowland & Heifner v. Ladiga, 21 Ala. 9; also,

Rowland v. Ladiga, 9 Porter, 491; Jones & Parsons v. Inge & Mardis, 5 Porter, 327; Fipps v. McGehee, 5 Porter, 413; Wilcox v. Jackson, 13 Peters, 498; Stephens v. Westwood, 25 Ala. 719; Marsh v. Brooks, 8 Howard, 232; Johnson v. McIntosh, 8 Wheaton, 574; Ladiga v. Rowland, 2 How. 581; 2 Yerger, 143, 407,; 8 Yerger, 249.

The plaintiff's patent recites, that "Co-e-jus-hadjo, one of the Creek tribe of Indians, under the provisions of the treaty of March 24, 1832, became entitled" to the land sued for. This recital is an admission that Co-e-jus-hadjo was the head of a family belonging to the tribe, that the land was surveyed by the United States, was selected by him as his location, and that he was located upon it; and thus dispenses with proof of those facts. That the recitals may be looked to for this purpose, see Jones & Parsons v. Inge & Mardis, 5 Porter, 327; McCravey v. Remson, 19 Ala. 436; 4 Peters, 182; 6 Peters, 598, 611; 5 Cowen, 216; 9 Cowen, 86, 128; 4 Binney, 231; 4 Wash. C. C. 691; 10 Mass. 155; 9 Wendell, 209; Rawle on Covenants for Title, 485.

The title being thus shown to have vested in the Indian, the subsequent sale of the land under the provisions of the act of 1837, as recited in the plaintiff's patent, was a mere nullity, and could not operate a divestiture of that title. The Indian's title was perfect under the treaty, without a patent, which could only operate as an admission by the United States that all the provisions of the treaty had been complied with on the part of the Creek nation. The act of congress of 1837, providing for the sale of unsold reservations, is a gross usurpation of authority, contrary to the provisions of the treaty, and therefore void; and the plaintiff's patent, showing on its face that it was issued without authority, and in violation of treaty rights, is also void.—Minter v. Commelin, 18 How. 87.

WALKER, J.—The great question of this case is, whether the government of the United States had the power to sell the half-sections of land reserved to the heads of families of the Creek tribe of Indians, after the expiration of five years from the ratification of the treaty

of 24th March, 1832, with that tribe. The decision of this question must be governed by the character of the estate which the heads of families took under the treaty in the lands selected by them.

The first article of the treaty is in the following words: "The Creek tribe of Indians cede to the United States all their lands east of the Mississippi river." The words of this article are clear, precise, have an evident meaning, lead to no absurd conclusion, and therefore have no need of interpretation, and it is not allowable to interpret them.—Vattel's Law of Nations, 244. They invest the United States with the title to all the lands east of the Mississippi. There are no subsequent clauses, which make exceptions from the comprehensive grant of the first article, or which qualify or restrict that grant. The subsequent clauses make provisions for the benefit of individuals, but they are benefits to be conferred by the United States, in consideration of the grant made to the United States by the tribe.

The engagements on the part of the United States, in the second article, to allow selections of sections by the ninety principal chiefs, and of half-sections by heads of families, and that twenty sections should be selected for orphan children, are not exceptions or reservations from the cession made by the first article of any pre-existing individual right in the chiefs, heads of families, or orphan children. This will be apparent from the historic fact, stated by the counsel, that the lands were the property of the tribe, and were not cut up into individual estates. The same thing is also clearly manifest from the language of the treaty, declaring that the lands were to be afterwards selected, and attempting no further specification than that the selections should conform to the lines of survey, and should include, when practicable, the improvements of the Indian selecting. The beneficiaries under the second article are not the grantors who make the conveyance effected by the first article. The treaty recognizes the title as passing from the tribe in its national capacity, and vesting in the United States; and the stipulations for the benefit of individuals are made by the

United States, upon a consideration passing from the tribe. Individuals take the benefits provided for them from the United States. .

The second and sixth clauses are declaratory of some of the trusts accompanying the transfer of the lands, which are by the treaty imposed upon the United States. The government, by virtue of the first article, takes the title to the lands, and then contracts to do certain things for the benefit of persons designated in the treaty.

As the individual Indians had no pre-existing title, which was reserved by the treaty, or excepted from it, and as the title by the first article vested in the United States, we must look to the stipulations and engagements made by the United States in the articles following the cession, to ascertain the individual rights growing out of the treaty. Whatever rights these Indians may have, result from those stipulations and engagements, and by them must be measured.

We proceed to inquire as to the legal effect of the stipulations in favor of heads of families, whose rights alone are to be considered in this case. The second article of the treaty, so far as it pertains to the point of inquiry, is in the following words: "The United States engage to survey the said land as soon as the same can conveniently be done after the ratification of this treaty; to allow ninety principal chiefs of the Creek tribe to select one section each, *and every other head of a Creek family to select one half-section each; and which tracts shall be reserved from sale, for their use, for the term of five years, unless sooner disposed of by them.* A census of these persons shall be taken under the direction of the president, and the selections shall be made so as to include the improvements of each person within his selection, if the same can be so made; and if not, then all the persons belonging to the same town entitled to selections, and who cannot make the same so as to include their improvements, shall take them in one body in proper form." The third article authorizes a conveyance of the tracts with the approval of the president, and directs that the president shall make title on the completion of payment. The fifth article

provides, that all intruders should be removed, until the country should be surveyed and the selections made; that after the selections should be made, the article should not operate upon that part of the country not included in the selections; *and that intruders should be removed from the selections for the term of five years from the ratification of the treaty*, or until the same should be conveyed to white persons.

After the Creek territory was surveyed, and the census of those entitled to make selections was taken, and the heads of families made the selections, they had some sort of title to the lands selected, upon which an action of ejectment might be sustained or resisted. The treaty does not, however, allow the estate vested by virtue of the treaty a longer duration than five years after its ratification. The estate results from the engagement to allow selections to be made, and that the tracts selected shall be reserved from sale for the use of the reservees for the term of five years. From such an origin a title to endure longer than five years cannot be derived. The government is simply to reserve from sale, for the use of the described persons, for five years from the ratification of the treaty. The restriction of the obligation to reserve from sale to the period of five years, suggests the conclusion, that a resumption of the authority to sell after the expiration of that period was contemplated. If that clause of the treaty stood alone, the United States, at the end of the prescribed period, might have sold the land, and, if charged with a breach of faith by the Indian, might have successfully replied, that it stipulated for nothing more than a reservation from sale for his use for five years, and had fulfilled that stipulation to the letter.

That the estate resulting from the selection by the head of a family was intended to be limited to five years, is also indicated in the limitation to five years of the obligation of the United States to protect the selected tract from intrusion. The need of protection to the Indians' possession was perceived, and it was provided for as long a time as it was anticipated that a need of it would exist.

The power of sale conferred by the third article was

not an unlimited power of disposition, but a power to sell for a fair consideration, with the approval of the president. The existence of such a power is not inconsistent with a limited duration of the estate expressly prescribed, and does not of itself amplify the estate into a fee.

The conclusion which we have expressed is fortified by the fact, that no patent was to be issued until the end of five years, and then only to those desirous of remaining. If the fee was vested by the selection, no conceivable reason or propriety can be found for the withholding of the usual evidence of title for five years from all the Indians, and perpetually from those not desirous of remaining. If, at the expiration of five years, the Indian who had voluntarily emigrated, and the Indian who desired to remain, alike had a title to the land, why discriminate between them, and give a patent to the latter and not to the former? It would seem, that those who had emigrated would most need a paper title to protect their rights, not accompanied with possession, and would be more likely to be the object of favorable discrimination, as the policy of the government evidenced by the treaty was to encourage emigration. This argument acquires increased force from the fact, that in the case of Benjamin Marshall, who, under the 6th article, clearly had a right to a complete title, a grant by patent is provided for, and not postponed for five years.

It being concluded that the selection by the head of a family gave a right which terminated at the end of five years, the inquiry now arises, what is the character of the right bestowed by the fourth article of the treaty. That article is as follows: "At the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee-simple from the United States." If the article had read, "At the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall be invested with a fee-simple title," it certainly would not have been less favorable to the Indian. The interpretation of that language would be: "When the five years have expired, an Indian entitled to the selection, *if he desires to remain*, shall take in

fee." Such words would certainly prescribe a condition precedent to the vesting of the estate.—Vaughan v. Vaughan, 30 Ala. 329; 1 Jarman on Wills, 671. Drawing our argument from a view of the treaty alone, we are led to the conclusion, that the right resulting from the selection terminated at the end of five years, and that then upon the occurrence of a prescribed condition precedent a right to a fee would spring up.

There are decisions of this court touching the question under examination, and we must consider their bearing upon it. The case of Chinnubbee v. Nicks, 3 Port. 362, presented the question of the right of dower, on the part of the widow of an Indian who had made his selection under the treaty, and died before the expiration of five years from its ratification. The right of dower, and the existence of a fee within five years in the reservee, were denied, and the Indian is said to have *an election to acquire a fee*. This stands irreconcilable with later decisions, which characterize the estate of the Indian as a fee defeasible upon condition subsequent. The opinion in Jones & Parsons v. Inge & Mardis, 5 Porter, 127, contains a careful approval of the ruling in Chinnubbee v. Nicks.

From the decision in Wells v. Thompson, 13 Ala. 793, we quote the following paragraph: "The title acquired by the head of a Creek family, under the treaty, *was to continue for five years*, unless it was sooner conveyed with the approval of the president; but, if there was no such conveyance, *it reverted to the United States*, unless the reservee or his heirs were desirous of remaining in the country after the expiration of that period. True, this is not explicitly declared; yet it follows from the terms employed in the fourth article, in which the United States stipulate to issue patents to all the reservees, who are desirous of remaining at the end of five years. *All the title of the Indian tribe passed from it, and the federal government became the proprietor of the fee in the territory they had previously occupied.* The government engaged, among other things, to allot half-sections of land to each head of a family, to be enjoyed *for five years absolutely*, and in fee upon certain conditions. *Here was the grant of a fee-*

simple estate, defeasible on the happening, or rather not happening, of the event specified. If the condition was not performed as provided, the title of the reservee determined, and the land reverted in the United States, without any entry or other act on the part of its agents." In the case from which this quotation is made, it was not necessary to consider the question, whether the fee which might vest in the reservee after five years was a new estate, springing up on the performance of a condition, or the continuance of a pre-existing estate, not defeated at the end of five years, because the condition of its defeasance had not occurred. Hence some incongruity of expression has crept into it. The title which the Indian took by his selection, is spoken of as one "to continue for five years," and yet as reverting at the end of five years to the United States; as one to be enjoyed for five years absolutely, and in fee upon certain conditions, and yet as being a fee defeasible upon a condition subsequent. The conclusion that the estate which the reservee took was a fee, defeasible upon his not desiring to remain, is a *non sequitur* from that which precedes it. It is clearly a doctrine of the opinion from which we quote, that the title taken in the first place continued for only five years. If the estate was a fee defeasible at the end of five years, upon the not happening of a specified event, then the estate of the reservee who remained upon the land, and received a patent for the same, was the same in character after five years expired as before. If the Indian took a fee, merely continued on in existence if at the end of five years he desired to remain, then the estate after five years is a mere continuation of the same estate which existed before, and the two are but parts of the same fee; yet we know such is not the case. The estate before the expiration of five years is altogether different in its *quality* from that which existed after five years, if there was a desire to remain. Many of the incidents of a fee were carefully and expressly excluded from the title of the reservee before the end of five years. He could alien only by sale, and by sale only upon payment made, and in the manner directed by the president, and with the president's approval. Upon the

occurrence of the specified condition after five years, the Indian was to receive a patent, the evidence of a complete and unqualified fee, by virtue of which he would hold the land without any of the qualifications or incidents which attached to his previous title.

While the argument in *Wells v. Thompson* seems to sustain the position taken by us, its conclusion treats the two distinct and distinguishable estates existing before the expiration of five years and afterwards, if there was a desire to remain, as parts of the same fee.

The language used in *Corprew v. Arthur*, 15 Ala. 525, a case like the above, requiring no consideration of the precise point now in hand, is almost identical with that above quoted, and we decline to follow either of them in the conclusion announced.

In *Rowland & Heifner v. Ladiga*, 21 Ala. 9, it is treated as an established fact in the case, that Ladiga remained on the land, and was forcibly carried away from it after the five years; and the question was, what was a sufficient manifestation of her desire to remain on the land, and what would be the rights of her heirs, if the condition was complied with. The question of this case really did not arise before the appellate court in that case. It was immaterial in that case, as in *Wells v. Thompson*, and *Corprew v. Arthur*, whether the Indian was regarded as taking by the selection a fee defeasible upon condition subsequent, or as taking after the expiration of five years upon a condition precedent. In either view of the law, the rights of the parties were the same. And no argument is adduced upon the question. A departure from the conclusion expressed in those cases, as to a defeasible fee, involves a disturbance of no rights, and is, in our opinion, demanded by a just construction of the treaty, by a respect for our older decisions, and by the interests alike of the government, of the purchasers of the lands, and of the Indians, who receive the purchase-money under the act of congress, a thing of much more value to them than the land.

Whatever claim the Indian reservee may have had upon the generosity or justice of the government, he had no

claim to the land after the expiration of five years from the ratification of the treaty, unless he desired to remain. That he desired to remain, cannot be assumed. A party desiring to set up an outstanding title in the Indian reservee must show affirmatively the condition precedent upon which that title depended. The court below erred, therefore, in assuming that the reservee had a paramount title to the land, and that therefore the patent was void.

Whether the defendants are in a condition to set up the title of the reservee, and whether the patent can be controverted by any other than the reservee, and whether the decision of the government as to the performance of the condition precedent is not conclusive, are questions which we deem it unnecessary to consider in the case as now presented.—*Jones & Parsons v. Inge & Mardis, supra.*

The judgment of the court below is reversed, and the cause remanded.

JENKINS' EXECUTOR *vs.* JENKINS.

[PARTIAL DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Commissions of executor or administrator.*—On partial distribution of a decedent's estate, the executor or administrator is not entitled to commissions on slaves which are distributed unsold.

APPEAL from the Probate Court of Talladega.

IN the matter of the estate of Wm. Jenkins, deceased, on the petition of the widow, who had dissented from the will, for her distributive share of the personal property. The only matter assigned as error in this court is "the refusal of the court below to allow the appellant [the executor] commissions, as shown in the bill of exceptions." The ruling of the court below is thus stated in the appellant's bill of exceptions: "The executor moved the court to allow him two-and-a-half per cent. commissions for receiving, and the same per cent. for disbursing, on the

sum of \$48,856, or such other sum as the court may now here decree to be paid to the said widow as her distributive share. It was admitted, that the said executor had performed his trust well and faithfully. The court refused the motion, and ruled that commissions could not be allowed on any other property than money, or the representative of money; to which decision of the court the executor excepted," &c. The decree of the court shows, that this amount, \$48,856, on which the executor asked the allowance of commissions, "was composed of the following items: Cash and cash notes, \$16,950 25; bank-stock, \$7,600; negroes, \$29,900; mules, \$860; cattle and oxen, \$305; grain, stores, &c., \$2,240 75—amounting in all to \$48,856."

GOLTDHWAITE & SEMPLE, for the appellant.

PARSONS & J. WHITE, *contra*.

RICE, C. J.—When the distributive share of a widow embraces slaves that have not been sold, as well as other property, the executor or administrator is not entitled to commissions on *the whole* of it. He is not entitled to commissions on slaves distributed among the distributees. Claycomb v. Claycomb, 10 Gratt. 589; Wilson v. Wilson, 30 Ala. 670; Shepard v. Parker, 13 Ired. 103; Potter v. Stone, 2 Hawks' Rep. 30; Newberry v. Newberry, 28 Ala. R. 691; Stong v. Wilkson, 14 Missouri Rep. 121; Gordon v. West, 8 New Hamp. R. 444.

That principle would have been violated by granting the motion of the executor as made in the present case. The motion as made clearly asked too much; it claimed more than the executor was entitled to; and for that reason, if for no other, the probate court was justified in overruling it.

There is no error, and the decree of the probate court is affirmed.

NOTE BY REPORTER.—This case was decided at the June term, 1858, but the opinion was accidentally mislaid, and hence was not reported in its proper place.

INDEX.

ACTION.

1. *Against probate judge for issuing marriage license to minor.*—In issuing a marriage license, a judge of probate acts ministerially, not judicially; and if he issues a license to a minor, without the consent of the parent or guardian, as required by section 1950 of the Code, the fact that he honestly believed that the infant was of lawful age, or that the infant made affidavit before him that such was the fact, is no defense to an action to recover the penalty prescribed by section 1953.—*Cotten v. Rutledge*. . . 110
2. *Against trustee or bailee.*—Where money is deposited in the hands of a trustee or bailee, for the use and benefit of a minor, to be expended by him in defraying the charges of her clothing, schooling and other necessary expenses, under a contract which would authorize the minor, on attaining majority, to maintain an action for money had and received, if a balance had been ascertained against him on settlement, or if he never entered on the discharge of the fiduciary duties devolved on him,—the fact that the trustee, in a former action brought against him by the minor, under appropriate issues, proved all the expenses incurred by him under the contract, and the plaintiff then recovered a judgment on verdict against him, which judgment is unreversed, restores the plaintiff's right of action on the contract, as if the trustee had never entered on the discharge of his duties, or a balance had been ascertained against him on settlement.—*Vincent v. Rogers*. 224
3. *By trustee against trust estate.*—The personal representative of a deceased administrator cannot maintain an action at law against a succeeding administrator *de bonis non* of the first intestate, to recover reimbursement for moneys paid out to an attorney-at-law on account of professional services rendered in and about the business of the administration, or to charge the estate with the payment of such services.—*Cooper's Adm'r's v. Tillman's Adm'r's*. 332

ACTION—CONTINUED.

4. *Against married woman.*—An action at law does not lie against a married woman, jointly with her husband, on an open account contracted during coverture.—*Childress and Wife v. Mann & Co.*..... 206
5. *Against husband by wife's administrator.*—An action for money had and received lies against the husband, in favor of the personal representative of his deceased wife, to recover money paid over to him by the executors of the wife's father under a legacy to her, to which his marital rights never attached. *Johnson's Adm'r v. Johnson.*..... 284
6. *By administrator of deceased heir-at-law to recover proceeds of unauthorized sale of lands.*—If an executor makes an unauthorized sale of lands, as to which his testator died intestate, the administrator of one of the deceased heirs has no interest in the proceeds of sale, and cannot maintain an action for any portion thereof..... 284
7. *On lost or destroyed bank-note.*—An action at law does not lie against a bank, to recover the value of a lost note or bill, which, passing from hand to hand by delivery merely, might be presented to the bank by the finder for payment; but, when a bank-note has been destroyed, thus rendering it impossible that the bank can be made to pay it a second time, the owner at the time of the loss may maintain an action against the bank for its value, and is not compelled to go into chancery.—*Bank of Mobile v. Meagher & Co.*..... 622
8. *Section 2151 of the Code, respecting actions on lost bills and notes, construed.*—Section 2151 of the Code, which provides a remedy on certain instruments lost or destroyed, being a substantial reenactment of the act of 1828 on the same subject, and, therefore, to be regarded as a legislative adoption of the judicial construction which the former statute had received, does not abrogate any common-law remedy for the recovery of bank-notes lost or destroyed; nor does the proviso to that section, declaring that it "must not be so construed as to authorize a suit for the recovery of a note or bill issued by any incorporated bank to pass as money, and alleged to be lost or destroyed," amount to an inhibition of an action at law on such lost note or bill..... 622
9. *When action lies on judgment.*—In this State, an action lies on a judgment after the expiration of one year from its rendition, although an execution may also be sued out upon it.—*Elliott v. Holbrook, Carter & Co.*..... 659
10. *Right of subrogation not enforced by action at law.*—If a surety or endorser pays off a judgment recovered against him, after the return of "no property found" on a judgment previously recovered against his principal, the right of subrogation thereby accruing to him cannot be enforced in an action at law.—*Smith v. Harrison.*..... 706

ACTION ON THE CASE.

See BAILMENTS,
CORPORATIONS.

ADULTERY.

See DIVORCE.

ADVERSE POSSESSION.

1. *Between coterminous proprietors.*—If two coterminous proprietors of land agree upon a dividing line, jointly construct a dividing fence in accordance with that agreement, and occupy up to that fence, their possession is adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, ripens into a perfect title.—*Brown v. Cockerell*. 38
2. *Same.*—Where a dividing fence is run beyond the true line, whether from inadvertence, ignorance, or convenience on the part of the owner, and with no intention to claim up to it as the dividing line, his possession is not adverse to the adjoining proprietor; nor can it, when accompanied by acts of ownership, and continued for the length of time prescribed by the statute of limitations, perfect a title as against such adjoining proprietor 38
3. *How affected by subsequent agreement.*—If a perfect title to the land in dispute has vested in one of the parties, by virtue of his adverse possession for the length of time prescribed by the statute, his title cannot be divested by a subsequent parol agreement with the adjoining proprietor to have the boundary line between them surveyed; but such agreement is a matter for the consideration of the jury, in determining the question of adverse possession 38
4. *Notoriety of possession.*—Notoriety is an important constituent of an adverse possession, as a fact from which notice or knowledge may be presumed: but, where actual notice or knowledge is brought home to the party to be affected thereby, it is not necessary that the possession should be notorious. 38
5. *Presumption from lapse of time.*—In an action brought by an administrator *de bonis non*, against one claiming under a purchase at a public sale by the administrator in chief, the regularity of the sale, and of the order under which it was made, may be presumed from the lapse of twenty years, accompanied with proof of adverse possession under the sale for that length of time, and of the fact that the records of the court were loosely kept about the time when the order of sale was made.—*Wyatt's Adm'r v. Scott*. 313

AGENCY.

1. *Execution of note by agent.*—A promissory note, signed by the defendant in his own name, with the addition of the words, "secretary Auburn Masonic Female College," *prima facie* imposes a personal obligation on him.—*Drake v. Flewellen*. 106

AGENCY—CONTINUED.

2. *Respective liabilities of principal and agent on note executed by agent.*—When an agent is sued on a promissory note which, *prima facie*, imposes a personal obligation on him, and seeks to defend himself on the ground that the note was in fact the contract of his principal, he must make his defense under a sworn plea; and, if the principal is a private corporation, must show that it had authority to bind itself. 106
3. *Liability of owner of steamboat on acceptance of bill by captain.* If the owner of a steamboat, on whom a bill is drawn by the clerk, addressed to "the owner of steamboat M.," authorizes the captain to accept for him, by writing his own name, with the addition of the word "captain," across the face of the bill; and the acceptance is made by the captain in that name and form,—such acceptance is binding on the owner.—*May v. Hewitt, Norton & Co.* 161
4. *Attorney's authority to make admissions.*—An agreement or admission of counsel, as to the conduct of a trial in court, has the same binding efficacy as if made by the party himself.—*Rosenbaum v. The State.* 354
5. *Competency of agent as witness for principal.*—In an action on a note given for the hire of a slave, by an assignee against the maker; the defense being that the owner agreed to sell the slave to the defendant at the expiration of the term, for a stipulated sum including the hire, but afterwards failed and refused to comply with said agreement; an agent, whom the defendant employed to procure the slave for him, and who took a bill of sale in his own name, is a competent witness for the plaintiff, although an action of detinue is pending against him, at the suit of the defendant, for the recovery of the slave.—*Nesbitt v. Pearson's Adm'rs.* 668

ALIMONY.

See DIVORCE.

AMENDMENT.

1. *Of bill in chancery.*—Where the original bill was filed by the husband, as sole legatee of his deceased wife, to recover her distributive share of her father's estate; and the amended bill set up a marriage contract between him and his wife, which secured to him a life estate in her personal property, with a remainder to her separate use,—*held*, that the amendment did not make a new case, since each of the titles asserted vested in the complainant the entire interest in the property sought to be recovered.—*Blackwell v. Blackwell.* 57
2. *Of judgment nunc pro tunc.*—An entry "on the minutes kept by the presiding judge," in these words, "Service proved, and judgment," is sufficient to authorize an amendment of the judgment at the next term, *nunc pro tunc*, so as to show that proof

AMENDMENT—CONTINUED.

- of the service of the writ was made to the court.—West v. Galloway's Adm'r..... 306
3. *Same*.—When a judgment is amended *nunc pro tunc*, after an appeal has been sued out, by the addition of another party defendant, the amendment will be considered as relating back to the date of the original judgment, for the purpose of bringing up the entire case with the new party, but not for the purpose of defeating the appeal on account of the want of proper parties, or a misdescription of the judgment in the appeal bond. Farmer v. Wilson..... 446
4. *Of account-current*.—The allowance of an amendment of the account-current filed by an administrator is not a matter which will work a reversal of the decree on error, when the record does not show that the distributees were thereby surprised, or that they desired a continuance.—Parker's Heirs v. Parker's Adm'r 459

APPEALS.

See ERROR AND APPEAL.

ARBITRATION AND AWARD.

1. *Construction of statutes respecting arbitrations*.—Statutory provisions in relation to arbitration should be liberally construed by the courts.—Tuskaloosa Bridge Co. v. Jemison..... 476
2. *Difference between arbitration under statute and at common law*.—Where a reference and award, though defective in some of the directory provisions of the statute, contain a substantial compliance with all its requisitions, (Code, §§ 2709–24,) they will be upheld as made under the statute..... 476
3. *Requisites of submission*.—In a statutory reference of matters not existing in the form of a pending suit, it is not necessary that the matters in dispute should be stated with that degree of fullness and particularity which are requisite in pleading: the submission in this case is neither too concise nor too general, and sufficiently shows the character in which the parties are bound..... 476
4. *Requisites of award*.—To sustain an award under the statute, it is sufficient that the arbitrators took the oath prescribed, gave the required notice, or had the parties personally present before them, and decided the matters submitted to them..... 476
5. *Requisites and sufficiency of submission*.—A written agreement, "between R. J., acting individually, and S. K., and between the Columbus Bridge Co., represented by R. J. as its president, and S. K.," signed by both parties, and submitting to the determination of certain named arbitrators "the difficulties existing between the above mentioned parties in relation to the said Columbus bridge," is a substantial compliance with the requisi-

ARBITRATION AND AWARD—CONTINUED.

- tions of the statute (Code, §§ 2709–21) relative to submissions to arbitration.—*King v. Jemison*..... 499
6. *Requisites and sufficiency of award*.—Under a written submission to arbitration, “between R. J., acting individually, and S. K., and between the Columbus Bridge Company, represented by R. J. as its president, and S. K.,” of “the difficulties existing between the above mentioned parties in relation to the said Columbus bridge,”—an award, duly signed by the arbitrators; determining “that the said J. and K. are equal owners of all the stock in said bridge-company;” settling “the profit and loss of said stock upon the basis of their equal interest and ownership;” and finally, after reciting that the arbitrators, “after a careful investigation of the accounts, papers and evidence submitted, have made up an accurate account between the said said S. K. and R. J., in the matter of their joint interest in the stock of the bridge-company,” deciding that said K. is indebted to J. in a specified amount, and directing payment to be made, shows a determination of the matters submitted, and is sufficient, 499
7. *Admissibility of parol evidence to affect award*.—On motion to have an award entered up as the judgment of the circuit court, the oral testimony of one of the arbitrators, contradicting one of the facts recited in the award as having been ascertained by the arbitrators, is inadmissible; the award not being assailed for fraud, partiality, or corruption..... 499
8. *Execution on award*.—If an award, made in substantial compliance with the requisitions of the statute, is not performed within ten days after notice of its rendition and delivery of a copy thereof, the papers may be filed in the office of the circuit court, and an execution immediately issued on the award..... 499
9. *Notice of award*.—When the time for the rendition of an award is enlarged at the request of one of the parties, who is personally present, in order that he may have an opportunity to produce a paper; and the award is not rendered until after the expiration of the enlarged time,—the party is not entitled to notice of its rendition, unless it was expressly stipulated that he should have such notice.—*Scruggs v. Bibb*..... 481

ASSUMPSIT.

See ACTION.

ATTACHMENT.

1. *Motion to quash attachment by stranger to record*.—An original attachment, regular on its face, and supported by a regular affidavit, cannot be quashed, on the motion of a stranger to the record, “who is shown to have an interest in the question and motion,” for matter *dehors* the record, which is properly triable by a jury.—*Cockrell v. McGraw*..... 525
2. *Affidavit for garnishment*.—When a garnishment is sued out un-

ATTACHMENT—CONTINUED.

- der section 2472 of the Code, if the affidavit corresponds with the requirements of that prescribed by section 2471, it is sufficient.—*Smoot v. Hart*,..... 69
3. *Garnishment lies against marshal of municipal corporation*.—A judgment creditor of a municipal corporation, having obtained a return of "no property" on an execution, may (Code, § 2472,) by process of garnishment against the marshal, reach and subject the funds of the corporation in his hands, arising from taxes, fines and forfeitures..... 69
4. *What defenses garnishee may make*.—An agreement between the attaching creditor and the garnishee, by which the former undertook, for valuable consideration, to pay the debt due from the garnishee to the defendant in attachment, is not available to the garnishee as a defense in the garnishment suit.—*Mathews v. Robinson*,..... 320
5. *When garnishee may enjoin proceedings*.—A garnishee may come into equity, to enjoin proceedings by a non-resident plaintiff, on proof of an agreement between him and the plaintiff, founded on valuable consideration, by which the latter undertook to pay the debt due from the garnishee to the defendant..... 320
6. *What demands may be subjected by garnishment*.—Where a garnishee answers, "that he is indebted to the said defendant or his wife, by promissory note in the sum of \$175, due January 1, 1856, which note was given by him to the said defendant's wife, the trade for which it was given having been made and agreed upon by both the defendant and his wife,"—the legal presumption is, that the note was given for property belonging to the wife's separate estate; and the plaintiff is not entitled to judgment against the garnishee on the answer.—*Saunders' Adm'r. v. Garrett*,..... 454
7. *Notice to claimant of attached debt*.—Where the garnishee's answer shows, *prima facie*, that the debt which he owes belongs to the separate estate of the defendant's wife, and not to the defendant himself, the statute (Code, § 2549) does not authorize a notice to the wife, to contest with the attaching plaintiff her right to the debt; and if a notice is issued to her, it may be treated by her and the court as a nullity..... 454
8. *Waiver by garnishee of judgment discharging him*.—If an issue is made up between a garnishee and the attaching creditor, contesting the garnishee's answer, after the rendition of a judgment discharging him on his answer, and such issue is tried without objection on his part, he must be considered as having waived the judgment discharging him, and cannot invoke it in the appellate court as precluding the plaintiff from assigning errors upon the rulings of the court on the trial of the issue. *Sevier v. Throckmorton*..... 512
9. *Garnishee's answer not evidence for him*.—When the answer of a garnishee is contested by the attaching creditor, although the

ATTACHMENT—CONTINUED.

- onus* is on the plaintiff, the answer itself is not evidence for the garnishee:..... 512
10. *Damages in action on attachment bond*.—In an action on an attachment bond, if the attachment was only wrongfully sued out, the plaintiff is entitled to recover the damage actually sustained, which does not include the injury to his wounded feelings; but if sued out wrongfully and vexatiously, he is entitled also to recover vindictive damages.—*Floyd v. Hamilton*..... 235

ATTORNEY-AT-LAW.

See AGENCY, 4.

BAIL.

1. *Validity of recognizance*.—A recognizance, taken by a justice of the peace, from a party who is brought before him on a criminal charge, conditioned for the party's appearance, on a day certain, before the said justice, "or some other justice of the peace," is void for uncertainty, when no place is specified for the party's appearance.—*The State v. Allen*,..... 422
2. *When recognizance forms no part of record*.—A recognizance, copied into the transcript by the clerk, but not made part of the record by exceptions or appropriate reference, cannot be looked to as part of the record of the proceedings against bail on their forfeited undertaking.—*Cantaline v. The State*..... 439
3. *Sufficiency of judgment in describing and identifying case*.—A judgment *nisi* in the form prescribed by the Code, (§ 3691,) to which is prefixed the name of the case, with a description of the offense charged, and which recites that the recognizance was conditioned for the principal defendant's appearance "to answer in this case," sufficiently describes and identifies the case..... 439
4. *Presumption in favor of judgment*.—Where the judgment final, in *scire facias* against bail, recites the issue and return of an *alias scire facias*, but the *alias* itself is not set out in the transcript, the appellate court will presume that the recitals are true, and that the *alias* has been lost..... 439
5. *Issue and return of alias scire facias*.—Where the judgment final recites the issue of an *alias scire facias*, returnable to the term at which said judgment was rendered, which was the term next after that at which the original *scire facias* was returned, and its return not found, this is sufficient to support the judgment final, although the *alias writ* is not set out in the record, and the date of its issue is left blank in the judgment..... 439

BAILMENTS.

1. *Liability of steamboat-men for loss of cash-letter*.—Held, on the authority of *Hosea v. McCrory*, 12 Ala. 349, that the owners of a steamboat are responsible, as common carriers, for the loss of a

BAILMENTS—CONTINUED.

- cash letter delivered to the clerk, if the evidence satisfies the jury that it is the general custom of steamboats to carry such letters, although they are delivered to the clerk, and are carried without charge or reward.—*Garey v. Meagher & Co.*..... 630
2. *Liability of steamboat-men, as common carriers, in matter of transshipment of freight.*—If goods are properly transhipped from one boat to another, under circumstances which justify such transshipment, it is not the duty of the first boat to take them on board again after the immediate risk or danger is past; nor are the owners of that boat liable for the subsequent loss of the goods on the other boat, although they could have received them on their own boat after the danger which caused the transshipment had passed.—*Cox, Brainard & Co. v. Foscue*,..... 713

BANKS.

1. *Construction of act of 1852 extending charter of Bank of Mobile.* The first proviso to the act of February 9, 1852, (Session Acts 1851-2, p. 104,) "to extend the charter of the Bank of Mobile," which limits the rate of interest to be charged by the bank on its loans and discounts to six per cent., does not apply to loans and discounts made before the commencement of the extended charter.—*Pearce v. Bank of Mobile*,..... 693
2. *When action lies on lost or destroyed bank-note.*—An action at law does not lie against a bank, to recover the value of a lost note or bill, which, passing from hand to hand by delivery merely, might be presented to the bank by the finder for payment; but, when a bank-note has been destroyed, thus rendering it impossible that the bank can be made to pay it a second time, the owner at the time of the loss may maintain an action against the bank for its value, and is not compelled to go into chancery. *Bank of Mobile v. Meagher & Co.*..... 622
3. *Sufficiency of complaint in description of bank-notes.*—It is not necessary, in the description of the lost notes on which the suit is founded, to aver their dates, or the time when they were payable: the courts will take judicial notice of the fact, that they were payable on demand..... 622
4. *Identification and proof of contents of lost bank-notes.*—In an action to recover the value of bank-notes lost or destroyed, it is incumbent on the plaintiff to first prove the existence and loss of the notes, and then to adduce proof of their contents; and proof of their aggregate amount and issue by the bank, without other evidence of their identity and contents, is not sufficient to authorize a recovery..... 622

BILL OF EXCEPTIONS.

1. *In probate cases.*—An appeal from a decree of the probate court, rendered on the final settlement of an administrator's accounts, is required to be tried on the bill of exceptions, (Code, § 1891;)

BILL OF EXCEPTIONS—CONTINUED.

- consequently, the appellate court will not look to other parts of the record, for supposed errors not disclosed by the bill of exceptions.—*Bartee and Wife v. James*,..... 34
2. *Construction*.—In a probate case, tried before the court without the intervention of a jury, a recital in the bill of exceptions, that the appellants “objected to the 5th volume of Porter’s Reports,” which was “offered and read in evidence” by the appellee, “being read for the purpose of proving any fact or facts; but the court overruled their objection, and they excepted,”—is not sufficient to show that the volume was read in evidence for the purpose of proving any fact or facts..... 34
3. *When exception to charge of court must be reserved*.—An exception to a charge given by the court to the jury, must be taken before the jury leave the bar, and comes too late after that time. *City Council of Montgomery v. Gilmer & Taylor*,..... 116

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Execution of note by agent*.—A promissory note, signed by the defendant in his own name, with the addition of the words, “secretary Auburn Masonic Female College,” *prima facie* imposes a personal obligation on him.—*Drake v. Flewellen & Co.* 106
2. *Liability of owner of steamboat on acceptance of bill by captain*. If the owner of a steamboat, on whom a bill is drawn by the clerk, addressed to “the owner of steamboat M,” authorizes the captain to accept for him, by writing his own name, with the addition of the word “captain,” across the face of the bill; and the acceptance is made by the captain in that name and form.—such acceptance is binding on the owner.—*May v. Hewitt, Norton & Co.*..... 161
3. *Admissibility of parol evidence to explain acceptance of bill*.—In an action against the owner of a steamboat, seeking to charge him as the acceptor of a bill of exchange, which was drawn by the clerk on the owner, and accepted by the captain, if it is doubtful from the face of the bill whether the acceptance imports a personal liability on the captain, parol evidence is admissible to show that such acceptance was intended to bind the owner, and that he authorized it to be made in that name and form.... 161
4. *Damages against payee and acceptor*.—In an action against the payee and endorser of an inland bill of exchange, duly protested for non-payment, the mere fact that the bill was addressed to, and accepted by the defendant, does not relieve him from the payment of damages.—*McKenzie v. Clanton*,..... 528
5. *Liability as partner on note executed in partnership name*.—In an action against several persons as partners, on a promissory note executed by the partnership, if one of the defendants pleads *non est factum*, it is incumbent on the plaintiff to prove that such defendant himself executed the note, or that he was a member of the firm when it was executed, or that he had been

BILLS OF EXCHANGE, AND PROMISSORY NOTES—CONTINUED.

- a member of the firm, and that the plaintiff, having had previous dealings with it, had not been notified of his withdrawal at the time when the note was given.—*Rabby & Co. v. O'Grady*, 255
6. *Conditional note*.—A condition incorporated in a note, to the effect that it may be discharged by the delivery of specific articles within a given time, is for the benefit of the maker; and if he fails to avail himself of it within the prescribed time, the note becomes absolute, and may be declared on, after maturity, according to its legal effect.—*Nesbitt v. Pearson's Adm'rs.*.... 668
7. *Discharge of note by contemporaneous oral agreement*.—An executory oral agreement, made contemporaneously with the execution of a promissory note, is not available as a defense to an action on the note, without proof of its performance; and this, notwithstanding its performance is proved to be impossible. *Thompson v. Rawles*,..... 29

BONDS.

1. *Difference between common-law and statutory bonds*.—When a bond is valid only as a common-law obligation, and is not governed by the statutory provisions respecting remedies on official bonds, a suit can only be maintained upon it in the name of the obligee, and there can be but one recovery upon it; while, under the provisions of the Code, (§§ 2154, 131,) any person aggrieved may sue in his own name for the breach of an official bond, and such bond is not discharged by a single recovery; but bonds under which public officers have acted, and which are within the provisions of sections 132, though not strictly official bonds, are subject to the same remedies as official bonds. *Sprowl v. Lawrence*,..... 674
2. *Informal bonds of public officers*.—Section 132 of the Code, respecting informal bonds under which public officers have acted, applies not only to bonds which are "not in the penalty, payable and conditioned as prescribed by law," but also to bonds which are in the penalty, payable and conditioned as prescribed by law, but which were not executed, approved and filed within the time prescribed by law..... 674
3. *Delivery and acceptance of bond*.—If the bond of a public officer is executed and delivered to the approving officer after the expiration of the time prescribed by law, although he may then have no authority to approve or accept it as a statutory bond, it will be upheld as valid, for the benefit of third persons who may be interested in the discharge of the official acts performed under it..... 674
4. *Forfeiture of public office*.—The failure of a public officer to give bond within the time prescribed by law, (Code, § 125,) only renders him liable to a proceeding for the forfeiture of the office, but does not, *per se*, operate his instantaneous removal from it. 674

CHANCERY.

I. JURISDICTION.

1. *When creditor's bill lies.*—A creditor, having an unproductive judgment against the administrator *de bonis non* of his deceased debtor, cannot come into equity, to reach assets of the debtor's estate in the hands of the personal representative of the deceased administrator in chief, against whom a decree has been previously rendered by the orphans' court in favor of the debtor's distributees, which decree has been paid.—*Thomas v. Sterns*, . . . 137
2. *When wife may come into equity.*—A married woman, having a separate estate created by law, may come into equity to have her husband removed from the trusteeship of her estate, and to recover property which he has disposed of without authority. *Whitman v. Abernathy*, 154
3. *When widow may come into equity against husband's administrator.*—A widow cannot maintain a bill in equity against the administrator of her deceased husband, to recover money collected by the administrator on a note given for the purchase-money of the wife's land, when it appears that the entire interest in the note, except the annual interest which had accrued up to the death of her husband, belonged to the wife's separate estate under the Code: her remedy at law, in such case, is clear, adequate, complete, and exclusive.—*Sessions' Adm'r. v. Sessions*, . . . 552
4. *When garnishee may come into equity.*—A garnishee may come into equity, to enjoin proceedings against him by a non-resident plaintiff, on proof of an agreement between him and the plaintiff, founded on valuable consideration, by which the latter undertook to pay the debt due from the garnishee to the defendant.—*Matthews v. Robinson*, 320
5. *When stockholder in private corporation may come into equity.* Where an incorporated company enters into a written contract with one of its stockholders, appointing him its general agent and superintendent, and agreeing, in the event of his removal from that office, "to pay him the value of his interest as stockholder in said company, to be ascertained by a reference to two arbitrators, one to be selected by each party, with authority to them to select an umpire,"—such stockholder cannot come into equity, for the ascertainment and recovery of the value of his interest, without averring a full compliance on his part with all the stipulations of the agreement, or a sufficient excuse for his failure to comply; and the fact "that the company failed in his opinion, to appoint a suitable person as arbitrator," is not sufficient to excuse his refusal to submit to the arbitration.—*Watkins v. Tuska. & N. P. Man. Co.* 518
6. *Equitable relief against accident.*—The death of a sheriff, after he had received the purchase-money of land sold at execution sale, and had made due return of the execution, but before he had executed a deed to the purchaser, is an accident against which a court of equity will relieve, at the instance of the pur-

CHANCERY—CONTINUED.

- chaser or a sub-purchaser, by decreeing a divestiture of the title out of the defendant in execution.—*Stewart v. Stokes*, 494
7. *Laches explained*.—In such case, relief will not be refused on account of the laches of the purchaser or sub-purchaser, when it appears that the defendant in execution knew and acquiesced in the claim and exercise of ownership by the purchaser, until after the latter, having sold the land to another, had removed with all his property beyond the limits of the State. . . . 494
8. *Equitable relief against mistake*.—A purchaser, who, through mistake, has received from his vendor a blank piece of paper instead of a deed, cannot obtain relief in equity against the mistake, without showing that, on the discovery of the mistake, he applied to his vendor for a correction of it, or averring a sufficient excuse for his failure to do so.—*Black v. Stone & Co.* 327
9. *Equitable relief against mistake or fraud in obtaining conveyance*. If a purchaser of an undivided half interest in a tract of land, by mistake or fraud, and without the knowledge or consent of his vendor, obtains a conveyance of the absolute property, a court of equity will direct a re-conveyance to the vendor of an undivided half interest.—*Armour v. Lose*, 317
10. *Settlement and distribution of decedent's estate*.—The chancery and probate courts having concurrent jurisdiction over the settlement of decedents' estates, the former court will not, in the absence of special equities, take jurisdiction of a final settlement which has already been commenced in the probate court.—*Moore v. Lesueur and Wife*, 237
11. *Clerical misprision in partial settlement no ground of equitable relief*.—A simple error of calculation in the statement of an account, on a partial settlement had under the act of 1843, (Clay's Digest, 229, § 42,) is amendable in the probate court, *nunc pro tunc*, and constitutes no ground for a resort to equity. 237
12. *Equitable relief against probate decree*.—An administrator cannot come into equity, to obtain relief against a decree of the orphans' or probate court, on a ground which was available to him as a defense in that court, without showing a sufficient excuse for his failure to make his defense there. 237
13. *Same*.—After the final settlement of a decedent's estate before the probate court the widow cannot come into equity, to obtain an allowance for her support, under a provision in the decedent's will directing that she "be allowed a sufficient support to last her twelve months" from his decease, without showing a sufficient legal excuse for her failure to prosecute her claim before the probate court.—*Arnett's Executor v. Arnett*, 273
14. *Application of maxim, that he who seeks equity must do equity*. On bill filed by the maker against the assignee of a note, for the purpose of establishing an equitable set-off against the payee, if the complainant shows a case which, in the absence of all indemnity, would be sufficient to entitle him to relief, his mere

CHANCERY—CONTINUED,

- failure to disclose in his bill that he had received partial indemnity cannot deprive him of all claim to relief; especially where it appears that the appellate court, on a former appeal from the decree of the chancellor, who dismissed the bill on final hearing on pleadings and proof, decided that the complainant was entitled to relief; and this, notwithstanding the point was not then noticed by either the court or the counsel.—*Malone v. Carroll*,..... 191
15. *Equitable conversion*.—It is a settled principle of equity jurisprudence, that land, directed by will to be sold and converted into money, is to be considered and treated as money; and a direction for the postponement of the sale, until the happening of a future event, does not prevent the operation of the principle.—*High v. Worley*,..... 196
16. *Re-conversion*.—In such case, however, the parties interested may, at their election, re-convert the property into land; but such re-conversion can only be made by all the parties interested, and not by each separately for himself..... 196
17. *Election*.—The distributees of a deceased legatee cannot make such election, without showing that the absence of debts renders administration on the estate of the legatee unnecessary; nor can a married woman, not owning a separate estate by statute, make such election for herself, although she is living separate and apart from her husband..... 196
18. *Jurisdiction of equity where legal remedy is adequate and perfect*. The assignee of a patent-right, to whom a blank piece of paper instead of a deed of assignment was delivered by mistake, and who has sustained injury in consequence of his inability to obtain legal redress for infringements of the patent, has a complete remedy at law against his vendor, and, therefore, cannot come into equity, without alleging insolvency or some other ground of equitable interposition.—*Black v. Stone & Co.*..... 327
19. *Equitable lien*.—If an administrator grants indulgence to one of the distributees, on a note given for the purchase-money of slaves bought at a sale of the property of the estate, until the statute of limitations has barred a recovery on the note, this gives him no right to come into equity, to establish a lien on the slaves for the unpaid purchase-money.—*Moore v. Lesueur and Wife*,..... 237
20. *Equitable mortgage*.—A contract, under seal, between a workman and one of the part owners of a steamboat, by which the former agreed to make and put up an engine on the boat, and the latter agreed to pay him a stipulated sum in cash, and to give three notes or acceptances for another sum, payable four, six and eight months after date; and by which it was stipulated, that, for the better security of the payment of the said notes, the workman should retain a special lien on said boat and engine until the notes were paid,—creates an equitable

CHANCERY—CONTINUED.

- mortgage in favor of the workman, which is not dependent for validity on his retention of the possession of the boat.—*Donald & Co. v. Hewitt*,..... 534
21. *Endorsement on enrollment of steamboat construed to create lien.* An endorsement on the enrollment of a steamboat by the inspector of customs, made by the directions of the owner, declaring that "S. & H. hold a lien on said boat to secure the payment of six drafts," (given for work done on the boat,) "and this endorsement to be continued on all enrollments issued for the boat, until all the above drafts are fully paid, and S. & H. fully satisfied;" by which memorandum, it was averred, the owner "acknowledged, admitted, declared and gave a lien" for the entire indebtedness secured by the drafts, part of which was already secured by a special lien on the boat created by prior contract,—is the declaration of a valid trust, which a court of equity will sustain and enforce. (*WALKER, J., dissenting*, held, that the endorsement was not designed to evidence the declaration of any new trust, but was simply intended to give notice of a pre-existing statutory lien.)..... 534
22. *Writing held insufficient to create contract lien.*—A written instrument, signed by the master and principal owner of a steamboat, and filed with the boat papers in the office of the inspector and collector of customs; acknowledging an indebtedness on account of certain drafts which were given for work and materials for the boat, and adding, "the mortgage or lien to continue on the boat papers, as security for these drafts, until finally paid and released,"—does not create or evidence a contract lien on the boat, but is merely intended to give notice of the existence of a statutory lien..... 534
23. *When resulting trust will be established in equity.*—Where the surviving brothers and sisters of a decedent agree, that the money arising from the sale of his lands may be appropriated to the use and support of their father and mother, during the rest of their lives; and one of them, having the money in his possession, invests it in the purchase of a slave, taking the title in his own name, a resulting trust arises, at the election of the other brothers and sisters, in their favor; but when they file a bill to establish and enforce such trust, they must allege that the slave was purchased and paid for with the trust funds. *Danforth v. Herbert*,..... 497
24. *Equitable relief in aid of illegal contract.*—Equity will not lend its aid to enforce rights arising out of an illegal contract, either by establishing an implied trust, or by decreeing the restitution of money paid out in execution of such contract.—*Cothran v. McCoy's Heirs*,..... 65
25. *Void contract not enforced.*—Equity will not enforce the specific performance of a contract which is contrary to public policy and void.—*Evans v. Kittrell*,..... 449

CHANCERY—CONTINUED.

26. *Fraudulent deed not reformed.*—A court of equity will not, at the instance of the grantor, declare a deed, absolute on its face, to be a mortgage or trust, when the evidence shows that the transaction was intended by the parties to delay, hinder or defraud the grantor's creditors.—*May v. May's Adm'r*, 203
27. *Voluntary agreement not specifically executed.*—A court of equity will not, as in favor of a mere volunteer, even though he be the child of the promisor, compel the specific performance of a voluntary executory contract.—*Morris v. Lewis' Executor*, . . . 53
28. *Waiver of right of rescission or specific performance.*—A court of equity will neither rescind nor specifically execute a contract for the sale of lands, at the suit of the purchaser, when it appears that, after discovering his vendor's want of title to a part of the tract, he accepted a conveyance of the residue, and afterwards re-conveyed a portion of them to his vendor.—*Harrison v. Deramus*, 463
29. *Compensation in equity.*—When a purchaser files a bill in equity for the rescission or specific performance of a contract, and fails to establish either branch of his case, his bill cannot be retained, in the absence of some other special equity, for the purpose of decreeing to him compensation on account of a deficiency in the quantity of land conveyed to him. 463
30. *Purchaser at judicial sale not entitled to rescission of contract on account of ignorance or mistake of law.*—A purchaser of land at a public sale by an administrator, under an order of the orphans' or probate court, cannot obtain relief against it in equity, on the ground that the sale was void for want of jurisdiction in the court by which the order of sale was granted, when it appears that there was no warranty, no fraud, and no mistake or ignorance as to any material fact.—*Burns v. Hamilton's Adm'r*, 210
31. *Inadequacy of consideration no ground of rescission.*—Mere inadequacy of consideration, in the absence of other circumstances, is not sufficient to induce a court of equity to rescind a contract, unless the inadequacy is so great as to shock the conscience and amount to conclusive evidence of fraud.—*Saltonstall and Wife v. Gordon*, 149
32. *Equitable estoppel against assertion of vendor's lien.*—A court of equity will not enforce a lien for the unpaid purchase-money of land, at the suit of an administrator of the deceased vendor, when it appears that the purchaser also is dead; that his estate was duly declared insolvent, and settled as such; that the land was sold, under an order of the probate court, as belonging to his estate; that the vendor's administrator was a bidder at the sale, and publicly stated that the purchaser would get a good title; and that he filed the notes for the purchase-money as claims against the purchaser's estate, and received his *pro-rata* share of the proceeds of the sale of the land, which he does

CHANCERY—CONTINUED.

not offer in his bill to return or account for.—Williamson's
Adm'r v. Ross,..... 509

II. PLEADING AND PRACTICE.

33. *Amendment of bill*.—Where the original bill was filed by the husband, as sole legatee of his deceased wife, to recover her distributive share of her father's estate; and the amended bill set up a marriage contract between him and his wife, which secured to him a life estate in her personal property, with a remainder to her separate use,—*held*, that the amendment did not make a new case, since each of the titles asserted vested in the complainant the entire interest in the property sought to be recovered.—Blackwell v. Blackwell..... 57
34. *Who may join as plaintiffs*.—Where a marriage contract secures to the husband a life estate in his wife's personal property, with remainder in fee to the separate use of the wife, who, on her death, makes her husband her sole legatee, the wife's personal representative may join with her surviving husband in a bill to recover her distributive share of her father's estate; and if no letters of administration on her estate have been granted at the time of the exhibition of the original bill by the husband, her administrator, when subsequently appointed, may be brought in as a co-plaintiff in an amended and supplemental bill..... 57
35. *Parties to bill for distribution*.—To a bill which seeks the settlement and distribution of an intestate's estate, and which is filed by a distributee against the personal representative of the deceased administrator, the administrator of the intestate whose estate is sought to be distributed is a necessary party..... 57
36. *How wife, when insane, may sue*.—When the wife, suing by her next friend, files her bill for alimony against her husband, alleging insanity on her part, and cruelty and abandonment on the part of her husband; and the husband answers, denying all the allegations of the bill, but failing to raise any objection on account of its form,—he cannot reverse the chancellor's decree, rendered on pleadings and proof, on the ground that the wife, if insane, should have sued by committee, and not by next friend.—Mims v. Mims,..... 98
37. *Multifariousness*.—A bill filed by a married woman, seeking to recover property belonging to her separate estate, which her husband had sold without authority, and to remove him from the trusteeship of her estate, is not multifarious.—Whitman v. Abernathy,..... 154
38. *Allegations of purchaser's bill construed*.—An averment in a purchaser's bill, seeking relief against his purchase at an administrator's sale, "that he was ignorant that there was any defect in the title to said land, or that the title to the same did not pass by the said sale," or "that the first certificate for the land

CHANCERY—CONTINUED.

- had been improperly issued, and that a second one had issued," construed most strongly against the pleader, is merely an allegation that he was ignorant of the legal effect of the known facts, and not that he was ignorant of the facts which made the title defective.—*Burns v. Hamilton's Adm'r*, 210
39. *Further examination of witnesses, and cross bill for discovery, not allowable after final hearing, and reversal of decree on error.* When a bill has been dismissed by the chancellor, on final hearing on pleadings and proof; and the supreme court has reversed his decree, on error, declaring the principles which govern the case, applying those principles to the pleadings and proof, determining all the material points in favor of the complainant, and remanding the cause for further proceedings not inconsistent with the opinion, neither party can claim, as matter of right, to enter into a fresh examination of the questions in issue, either by a further examination of witnesses, or by a discovery from his adversary.—*Malone v. Carroll*, 191
40. *Exceptions to master's report.*—Under an exception to the master's report, on account of the allowance of an item in the statement of an account, a party cannot avail himself of the objection that secondary evidence was admitted without the proper predicate: an objection should be made to the testimony when offered, and an exception taken to the overruling of the objection.—*Taylor and Wife v. Kilgore*, 214
41. *Re-statement of account.*—If the chancellor, in ordering a re-statement of an account by the master, by mistake directs him to allow one item and reject another, while the opinion shows that he intended the latter item to be allowed and the former rejected, it is nevertheless the duty of the master to follow the decree, and not the opinion, 214
42. *Dismissal of bill without prejudice.*—When a bill is defective for want of necessary allegations, but the evidence shows that the plaintiffs have a good cause of action, the bill should not be dismissed absolutely; and if the chancellor, on final hearing on pleadings and proof, dismisses the bill absolutely, the appellate court will so far reverse his decree as to order the dismissal to be without prejudice.—*Danforth v. Herbert*, 497

CHARGE OF COURT.

1. *When exception to charge must be reserved.*—An exception to a charge given by the court to the jury, must be taken before the jury leave the bar, and comes too late after that time.—*City Council of Montgomery v. Gilmer & Taylor*, 116
2. *Abstract charge refused.*—A charge which is partly abstract may be refused entirely.—*Brown v. Cockerell*, 38
3. *Abstract charge not presumed.*—Where the bill of exceptions does not purport to set out all the evidence, the appellate court

CHARGE OF COURT—CONTINUED.

- will presume than an affirmative charge was not abstract.—*Nesbitt v. Pearson's Adm'rs*,..... 668
4. *Charge on effect of evidence*.—A party has the right to require the court to instruct the jury as to the legal effect of the evidence, when, after conceding all points on which there is a conflict of evidence, and all adverse inferences from the evidence, the undisputed facts establish a legal conclusion in his favor; and the refusal of such a charge when requested, unless some sufficient legal reason for the refusal is shown, will work a reversal of the judgment.—*Rhodes v. Otis*,..... 578
5. *When such charge is erroneous*.—A general charge, in favor of the plaintiff's right to recover, is erroneous, whenever there is the least conflict in the evidence on any material point.—*Drake v. Flewellen & Co*,..... 106
Also, *Peebles v. Tomlinson*,..... 336
6. *Charge invading province of jury*.—A charge to the jury, instructing them "that the testimony of a man who was asleep a part of the time, and who contradicted another witness on the question of the defendant's playing, should have no weight with them," is an invasion of the province of the jury.—*Carter v. The State*,..... 429
7. *Same*.—A charge which makes the defendant's guilt or innocence depend on what one witness *proved*, instead of facts to be found by the jury from the whole evidence, is obnoxious to the same objection..... 429
8. *Practice in giving further instructions to jury in absence of prisoner's counsel*.—The presiding judge having quit the bench, on finishing the business of the day, while the jury in a criminal case were deliberating on their verdict; and the counsel engaged in the case having left the court-room, under an agreement that the clerk might receive the verdict of the jury,—the fact that the court, on the request of the jury for further instructions, afterwards gave them an additional charge, which asserted a correct legal proposition in the presence of the prisoner himself, but in the absence of his counsel, and without their knowledge or consent, is not an error which will work a reversal of the judgment.—*Collins v. The State*,..... 435
9. *Charge referring to jury the meaning of words used by witnesses*. A physician having testified, that he had made a professional examination of a wound in the prosecutor's hand, but did not "*examine*" another wound in his side, a charge to the jury, instructing them that "they could consider whether the witness, in saying that he did not *examine* the wound in the side, meant that he did not examine it as a physician, or that he did not see or look at it at all," is not erroneous.—*Rosenbaum v. The State*..... 354
10. *Charge authorizing the jury to consider their own general knowledge and experience*.—A charge to the jury in a criminal case,

CHARGE OF COURT—CONTINUED.

- instructing them that, "in arriving at a correct verdict, they could consult their general knowledge and their own experience in life," is not erroneous..... 354
11. *Objectionable expression in charge withdrawn or explained.*—The presiding judge, in charging the jury, having characterized certain matters relied on for the defense as "*little matters*," (as they had been previously characterized by the prisoner's counsel in his argument to the jury,) this furnishes no cause of reversal, when the record shows that, before the jury retired, the judge told them that, in using the expression, "it was far from the intention of the court to characterize them as small or insignificant, or to indicate in what light they were to be considered and weighed by the jury."..... 354
12. *Charge on effect of good character as evidence.*—A charge to the jury, in a criminal prosecution for a misdemeanor, instructing them "that evidence of good character went only to the question of the defendant's guilt, and, if they found him guilty, should not be regarded in mitigation of the fine they might think proper to assess against him," is erroneous..... 354
13. *Charge on question of damages, excluding portion of evidence from consideration of jury, erroneous.*—Plaintiff having introduced a physician as a witness, who testified that, in his opinion, the slave whose soundness was in controversy was diseased at the time of the sale, and valueless; and there being no evidence of the actual value of the slave at that time, if she was not valueless,—it is error in the court to instruct the jury, "that if they were satisfied that the slave was unsound at the time of the sale, and if they believed the testimony of said physician as to her worthlessness, then they must find the full value of the slave for the plaintiff, although, on the whole proof, they might believe that the disease did not render her wholly valueless." Holloway v. Cotten,..... 529

CODE OF ALABAMA.

1. § 125. *Failure to file official bond.*—Sprowl v. Lawrence..... 674
2. § 132. *Informal official bond.*—Sprowl v. Lawrence.... 674
3. § 1058. *Retailing spirituous liquors.*—Daly v. The State..... 431
4. §§ 1166–69. *Warning hands to work public road.*—James v. Clarke County..... 51
5. § 1180. *Horse-racing in public road.*—Redman v. The State.... 428
6. § 1530. *Assignment of bond or note.*—Henley v. Bush..... 636
7. § 1603. *Implied revocation of will.*—Stubbs v. Houston..... 555
8. §§ 1668–75. *Grant of administration.*—Curtis v. Williams..... 570
9. § 1696. *Revocation of administration.*—Curtis v. Williams..... 570
10. § 1825. *Commissions of executor.*—Jenkins' Ex'r v. Jenkins.... 731
11. §§ 1853–54. *Objections to claims against insolvent estate.*—Hardy v. Meachem's Adm'r..... 457

CODE OF ALABAMA—CONTINUED.

12. §§ 1873-75. *Compensation to widow for dower.*—Sherard v. Sherard's Adm'r..... 488
13. § 1883 *Presentation of claims against decedent's estate.*—Harrison's Adm'r v. Jones' Adm'r..... 258
14. § 1891. *Appeals in probate cases.*—Bartee v. James..... 34
15. §§ 1950-53. *Marriage license to minors.*—Cotten v. Rutledge... 110
16. §§ 1961-69. *Divorces.*—Crossman v. Crossman..... 486
17. § 1984. *Conveyance of wife's separate estate.*—Whitman v. Abernathy..... 154
18. § 1987. *Liability of wife's separate estate for articles of family supply.*—Childress v. Mann & Co..... 206
19. § 2129. *Who are proper parties plaintiff.*—Henly v. Bush..... 636
Also, Smith v. Harrison..... 706
20. § 2131. *Actions by and against husband and wife.*—Childress v. Mann & Co..... 206
21. § 2151. *Actions on lost instruments.*—Bank of Mobile v. Meagher & Co..... 622
22. § 2154. *Who may sue on bond.*—Sprowl v. Lawrence..... 674
23. § 2253. *Demurrers*—Cotten v. Rutledge,..... 110
Also, Henley v. Bush,..... 636
Elliott v. Holbrook, Carter & Co..... 659
24. § 2288. *Competency of defendant as witness for co-defendant.* Rabby & Co. v. O'Grady,..... 255
25. § 2276. *Competency of person of mixed blood as witness.*—Dupree v. The State,..... 380
26. § 2290. *Competency of assignor as witness for assignee.*—Grayson v. Glover,..... 182
27. § 2302. *Competency of witness as affected by interest.*—Henderson v. Simmons,..... 291
Also, Blakey's Heirs v. Blakey's Executrix,..... 611
Nesbitt v. Pearson's Adm'rs,..... 668
28. §§ 2322-28. *Depositions.*—Thompson v. Rawles,..... 29
Also, Wilson v. Campbell,..... 249
29. §§ 2330-36. *Filing interrogatories to party at law.*—Ex parte McLendon,..... 276
30. § 2352. *Judgment on demurrer to evidence.*—Patterson v. Blake-ney,..... 338
31. § 2353. *Bill of exceptions.*—City Council of Montgomery v. Gilmer & Taylor,..... 116
32. § 2365. *Nonsuit on verdict for less than \$50.*—Wynn v. Simmons, 272
33. § 2366. *Judgment final without writ of inquiry.*—McKenzie v. Clanton..... 528
34. § 2396. *Security for costs by non-residents.*—Garrett & Bibb v. Terry,..... 514
Also, Weeks v. Napier,..... 568
35. § 2405. *What is available on error.*—Childress v. Mann & Co. . 206
36. § 2408. *Rehearing after final judgment at law.*—Elliott v. Cook, 490
Also, Stewart v. Williams, 492; Garrett & Bibb v. Terry..... 514

CODE OF ALABAMA—CONTINUED.

37. §§ 2471-72. *Garnishment on judgment*.—Smoot v. Hart,..... 69
38. § 2549. *Notice to claimant of attached debt*.—Saunders v. Garrett, 454
39. § 2647. *Notice by surety to creditor to sue principal*.—Savage's
Adm'r v. Carleton,..... 443
40. §§ 2709-21. *Arbitration and award*.—King v. Jemison,..... 499
Also, Tuskaloosa Bridge Co. v. Jemison,..... 476
41. § 3041. *Appeal bonds*.—Childress v. Taylor,..... 185
Also, Burdine v. Mustin,..... 634
McCollum v. McCollum's Executor,..... 711
42. § 3243. *Gaming*.—Harris v. The State..... 373
Also, Hawkins v. The State..... 433
43. § 3273. *Carrying concealed weapons*.—Sears v. The State..... 347
44. § 3374. *Limitation of criminal prosecution*.—Molett v. The State, 408
45. §§ 3397-98. *Recognizance of bail*.—The State v. Allen..... 422
Also, Cantaline v. The State..... 439
46. *Forms of indictments*.—Henry v. The State..... 389
Also, Molett v. The State..... 408
47. § 3535. *Filing and endorsing indictment*.—Russell v. The State, 366
48. § 3591. *Objection to grand jury*.—Russell v. The State..... 366
49. § 3600. *Accomplices*.—Davidson v. The State..... 350
50. §§ 3663-64. *Judgment of conviction corrected and affirmed*.
Russell v. The State..... 366
51. *Forms of complaint*.—McNeill v. Cook & Johnson..... 278
Also, Nesbitt v. Pearson's Adm'rs..... 668
Sprowl v. Lawrence..... 674
mith v. Harrison..... 706
52. *Former statute incorporated in Code*.—The re-enactment in the
Code of a former statute must be taken as a legislative adoption
of the judicial construction which the statute had received.
Bank of Mobile v. Meagher & Co..... 622

COMMON CARRIERS,

See BAILMENTS.

CONFLICT OF LAWS.

1. *Conflict between foreign and domestic liens on steamboat*.—A lien
on a steamboat, created by a foreign statute, for work, materials,
&c., cannot operate to defeat a lien acquired by attachment or
libel in this State, where the boat had been brought, before the
foreign lien was set up.—Donald & Co. v. Hewitt..... 534
2. *Validity of contract governed by what law*.—In the absence of
stipulations to the contrary, the validity and construction of
contracts are to be determined by the law of the place where
they were made; and the mere fact that a contract, invalid by
the law of the place where it was entered into, may be valid in
a foreign jurisdiction, is not sufficient to show that the parties
contemplated its performance in that foreign jurisdiction.—Ev-
ans v. Kittrell..... 449

CONSTITUTIONAL LAW.

1. *Waiver of personal attendance of witness.*—A deposition, taken in a civil suit between the prisoner and the prosecutor, may be read in evidence on the trial of the criminal prosecution, against the prisoner's objection, on proof of an agreement between his attorney and the counsel for the State that it might be read on the trial.—*Rosenbaum v. The State*..... 354
2. *Act of 1856, forbidding keeping slaves on plantation without presence of white person.*—The act of 1856, "the more effectually to secure subordination among slaves, by requiring the owner or overseer to reside with them," (Session Acts 1855-6, p. 18.) is not violative of any constitutional provision.—*Molett v. The State* 408

CONTRACTS.

1. *Sufficiency of consideration.*—An agreement between an infant's father and grand-father, by which the former delivered to the latter certain slaves belonging to the infant, upon the promise of the latter to keep them for the infant, to provide for her, and to give her, as the representative of her deceased mother, a child's portion in the distribution of his estate, constitutes the grand-father a mere depositary of the slaves for the benefit of the infant, and is not supported by a valuable consideration. *Morris v. Lewis' Ex'r*..... 53
2. *Same.*—A promise by defendant to plaintiff, made to induce the latter to comply with an existing contract between him and other persons, is without consideration.—*Johnson's Adm'r v. Sellers*..... 265
3. *Validity of contract contrary to policy of the pre-emption laws.*—A contract between the administrator of an insolvent estate and another person, to the effect that the latter should advance the money necessary to enable the former to enter a tract of land, to which his intestate had a pre-emption claim at the time of his death; that the administrator should take a certificate of entry in the name of his intestate, and should then have the land sold under an order of the orphans' court; and that the other party should become the purchaser at the sale, and should deduct from his bid the amount of money thus advanced by him to make the entry,—is contrary to the policy of the pre-emption laws, and consequently void.—*Cothran v. McCoy's Heirs.*... 65
4. *Validity of contract respecting emancipation of slaves.*—A contract, made in this State, and containing nothing to show that the parties contemplated its performance elsewhere, by which the purchaser of a slave binds himself to emancipate the slave whenever he shall have been reimbursed for the amount of the purchase-money by the proceeds of the slave's labor, is void. (*Overruling Prater's Adm'r v. Darby*, 24 Ala. 496.)—*Evans v. Kittrell* 449
5. *Validity of contract governed by what law.*—In the absence of

CONTRACTS—CONTINUED.

- stipulations to the contrary, the validity and construction of contracts are to be determined by the law of the place where they were made; and the mere fact that a contract, invalid by the law of the place where it was entered into, may be valid in a foreign jurisdiction, is not sufficient to show that the parties contemplated its performance in that foreign jurisdiction. 449
6. *Construction of contract.*—In the construction of verbal contracts, the conduct and acts of the parties in carrying out their engagements may be regarded, in order to see what interpretation they have themselves adopted, and what conditions have been waived or performed.—*Acker v. Bender*. 230
7. *Construction of contract as to intention of parties.*—A party is not bound to perform an act which is not within the stipulations of the contract, merely because the other party expected and understood that he would perform it, and he knew that fact. *Johnson's Adm'r v. Sellers*. 265
8. *Whether promise is original or collateral.*—If an agent of a private corporation contracts a debt on its supposed credit, when the corporation in fact had no authority to contract debts, the contract imposes an original, personal liability on the agent; but, if he gives his note, without any new consideration, for the amount of a debt previously contracted by another person for the corporation, such a note is a collateral contract, and void.—*Drake v. Flewellen & Co.* 106
9. *Title to personalty may pass by parol*—The title to personal property, although acquired by an instrument under seal, may pass by a parol contract.—*Acker v. Bender*. 230
10. *Implied contract between father and son.*—Whatever may be the claims of filial duty and affection, as between an aged and infirm father and his grown son, there is no principle of law, which requires the son, while living separate and apart from his father, to perform services for the latter without compensation, when the father is in comfortable circumstances; consequently, to support the son's claim to compensation for such services, proof of an express contract is not necessary.—*Parker v. Parker*. 459
11. *Time of performance of contract.*—When no time is specified for the performance of a written contract, by which defendant, acknowledging his receipt of his own note, payable to a third person, promised to return or account for it to the person from whom he received it, the legal presumption is, that the parties intended its performance within a reasonable time; and an action may be maintained for a breach after the lapse of six years.—*Heuley v. Bush*. 636
12. *Rescission of contract of hiring.*—The recovery of a judgment in trover, by the owner against the hirer, for the conversion of a hired slave during the term, together with satisfaction thereof, establishes a rescission of the contract, and estops the plaintiff from afterwards maintaining an action on the note given for the

CONTRACTS—CONTINUED.

- hire ; but the mere institution of an action of trover has no such effect, when the action is shown to have been successfully defended on the merits.—*Deens v. Dunklin*..... 47
13. *Waiver of performance of condition*.—A party may always waive and dispense with the performance of a condition in his favor. *Acker v. Bender* 230
14. *Release of mortgage by subsequent parol contract*.—A mortgage of personal property, so far as it conveys the title to the property to the mortgagee, may be released or discharged by a subsequent verbal contract : either an agreement by the mortgagor to do certain things, or the performance of those things by him, may be made the ground of settlement or discharge..... 230
15. *Discharge of note by contemporaneous oral agreement*.—An executory oral agreement, made contemporaneously with the execution of a promissory note, is not available as a defense to an action on the note, without proof of its performance ; and this, notwithstanding its performance is proved to be impossible. *Thompson v. Rawles*,..... 29
- See, also, CHANCERY, 24–31.

CONVERSION.

See CHANCERY, 15, 16, 17.

CORPORATIONS.

1. *Liability of municipal corporation for negligent construction of sewers*.—In the construction of sewers, a municipal corporation acts ministerially, and is responsible for damages caused by the careless and negligent manner in which that duty is discharged. *City Council of Montgomery v. Gilmer & Taylor*..... 116
2. *Same, for damage caused by flow of rainwater*.—Where a municipal corporation is charged by its charter with the duty of keeping its streets in repair, an action lies against it for damages caused by its neglect of that duty ; but it is not, *prima facie*, responsible for damages caused by its failure or omission to prevent the flow of rain-water from the streets upon the adjacent lots, inasmuch as the legal duty of adopting a judicious system of drainage is legislative in its character..... 116
3. *Relevancy of evidence in such action*.—In an action against a municipal corporation for damages caused by its neglect of duty in repairing streets and constructing sewers, it is competent for the plaintiff to prove notice to it of the condition of the street, and its failure or refusal to repair ; but evidence showing the motives which influenced the individual members of the corporation in refusing to support a proposition to repair, or that they were influenced by malice towards the plaintiffs, is irrelevant and inadmissible..... 116
4. *Same*.—The fact that the corporation was informed, at a meeting of its council, through the report of one of its committees,

CORPORATIONS—CONTINUED.

- that some slight repairs had been made upon a ravine in the street, is admissible evidence for the plaintiffs, as tending to show a recognition of the street by the corporation, as well as notice to it of the character of the repairs..... 117
5. *Charter of private corporation not judicially noticed.*—The charter of a female college, which is a private corporation, cannot be judicially noticed by the appellate court.—*Drake v. Flewellen & Co.*..... 106
6. *Garnishment lies against marshal of municipal corporation.*—A judgment creditor of a municipal corporation, having obtained a return of “no property” on an execution, may (Code, § 2472,) by process of garnishment against the marshal, reach and subject the funds of the corporation in his hands, arising from taxes, fines and forfeitures.—*Smoot v. Hart.*..... 69
7. *When stockholder in private corporation may come into equity.* Where an incorporated company enters into a written contract with one of its stockholders, appointing him its general agent and superintendent, and agreeing, in the event of his removal from that office, “to pay him the value of his interest as stockholder in said company, to be ascertained by a reference to two arbitrators, one to be selected by each party, with authority to them to select an umpire,”—such stockholder cannot come into equity, for the ascertainment and recovery of the value of his interest, without averring a full compliance on his part with all the stipulations of the agreement, or a sufficient excuse for his failure to comply; and the fact “that the company failed in his opinion, to appoint a suitable person as arbitrator,” is not sufficient to excuse his refusal to submit to the arbitration.—*Watkins v. Tuska. & N. P. Man. Co.*..... 518

COSTS.

1. *Liability of next friend for costs.*—In an action brought by an infant, suing by next friend, judgment for costs may be rendered against the next friend, if the plaintiff fails in the suit.—*Smith v. Gaffard.*..... 168
2. *Security for costs.*—An application for a rehearing after final judgment at law, (Code, § 2408,) by a non-resident defendant, is within the statute (Code, § 2396,) requiring security for costs, in “actions commenced by or for the use of a non-resident;” and the giving of a *supersedeas* bond does not dispense with the necessity for such security.—*Garrett & Bibb v. Terry.*..... 514
3. *Waiver of security for costs.*—If a garnishee answers, joins in the issue contesting his answer, and reserves exceptions to the rulings of the court on the trial of the issue, he cannot move to dismiss the proceeding, at a subsequent term, for want of security for costs on the part of the plaintiff, who was a non-resident.—*Weeks v. Napier.*..... 568
- See, also, **ERROR AND APPEAL.**

CRIMINAL LAW.

1. *Carrying concealed weapons*.—A knife which, in some of its essential particulars, is unlike a bowie-knife, may nevertheless be within the statute (Code, § 3273) against carrying concealed weapons; *secus*, as to a knife which, "in all its essential particulars," is unlike a bowie-knife.—*Sears v. The State*..... 347
2. *Keeping slaves on plantation without presence of white person*.—If a person keeps his slaves on a plantation separate from that on which he resides, and four miles distant from it, without the presence of a white person as agent or overseer, he is guilty of the offense denounced by the act of 1856, (Session Acts 1855-6, p. 18,) although he owns all the land intervening between the two places.—*Molett v. The State*..... 408
3. *Constitutionality of statute creating that offense*.—The act of 1856, "the more effectually to secure subordination among slaves, by requiring the owner or overseer to reside with them," (Session Acts 1855-6, p. 18,) is not violative of any constitutional provision..... 408
4. *Larceny by slave of master's goods*.—A slave may commit larceny by feloniously taking his master's goods.—*Oxford v. The State*, 416
5. *Sufficiency of verdict*.—Under an indictment charging the defendant, in two separate counts, with larceny and with receiving stolen goods, a verdict of "guilty as charged in the second count of the indictment, to-wit, of receiving stolen goods knowing them to be stolen," is a general verdict, and sufficient to support a conviction under the second count..... 416
6. *Horse-racing*.—Horse-racing in a public road, which is declared a misdemeanor by section 1180 of the Code, is an indictable offense, and punishable as a misdemeanor at common law, no punishment being prescribed by the statute.—*Redman v. The State*, 428
7. *Raffling*.—A conviction cannot be had under an indictment for gaming, (Code, § 3243,) on proof that the defendant took a chance in a raffle regularly licensed and paid for.—*Hawkins v. The State*..... 433
8. *Gaming with device or substitute for cards*.—A conviction cannot be had, under an indictment for gaming, on proof that the defendant played a game of euchre with dominoes, if the jury are satisfied from the evidence that the game of euchre with dominoes is an older game than euchre with cards, and that both cards and dominoes are still retained in common use in playing euchre; unless the evidence also satisfies the jury that, as matter of fact, dominoes were used in that particular game as a substitute for cards, although that fact was not intended by or even known to the players themselves.—*Harris v. The State*.. 373
9. *Conviction on testimony of accomplice*.—A participant in a game of cards is an *accomplice* of his adversary, within the meaning of the statute (Code, § 3600) which forbids a conviction on the uncorroborated testimony of an accomplice. (RICE, C. J., *dissenting*.)—*Davidson v. The State*..... 350

CRIMINAL LAW—CONTINUED.

10. *Retailing—Selling liquor drunk on or about premises.*—It being shown that the liquor sold by the defendant was drunk "in an alley, five or six feet wide, which led from the main street between his house and that of an adjoining proprietor; that the defendant had no control whatever over said alley, nor could he see drinking carried on there from his front door; that it did not lead into his back yard, nor was there any window opening from his storehouse into it,"—these facts alone, without explanation or addition, do not authorize the court to assert, as matter of law, in its charge to the jury, that the place where the liquor was drunk was *about* the defendant's premises. *Daly v. The State*..... 431
11. *Same—Implied waiver of question not raised in primary court.* The question, whether a licensed retailer or his clerk is liable to a criminal prosecution for selling spirituous liquors to a person of known intemperate habits, cannot be raised for the first time in the appellate court.—*Stallings v. The State*..... 425
12. *General notoriety admissible to prove knowledge of fact.*—The fact that the intemperate habits of the person to whom the liquor was sold were notorious in the neighborhood in which the defendant lived, is proper evidence for the consideration of the jury in determining whether his habits were known to the defendant. 425
13. *Assault with intent to murder—Charge on constituents of offense.* A charge to the jury, asserting that "the presenting of a pistol, loaded and cocked, within carrying distance, by one man at another, with his finger on the trigger, in an angry manner, is, of itself, an assault with intent to murder," is erroneous, because the facts stated do not necessarily raise a legal presumption of the existence of the intent to murder.—*Morgan v. The State* 413
14. *Intent as affected by drunkenness.*—Although drunkenness is no excuse for a crime, it may produce a state of mind which would render a party incapable of forming or entertaining the intention which is a material ingredient of the statutory offense of an assault with intent to murder.—*Mooney v. The State*..... 419
15. *Prior assault as defense.*—A prior assault on the prisoner by the person whom he is alleged to have assaulted, is not necessarily a defense, since the injury inflicted by the prisoner may not have been justified by the necessity of the case, nor proportioned to the injury inflicted on him..... 419
16. *Conviction of less offense than charged in indictment.*—Under an indictment for an assault with intent to murder, the failure of the prosecution to prove the special intent charged does not necessarily entitle the defendant to an acquittal, since he may nevertheless be convicted of a simple assault and battery..... 419
17. *Same.*—Under an indictment charging a slave with the murder of a white person, a conviction may be had for voluntary man-

CRIMINAL LAW—CONTINUED.

- slaughter. (STONE, J., *dissenting*.) (Overruling *Bob v. The State*, 29 Ala. 20.)—*Henry v. The State* 389
18. *Joinder of offenses in indictment*.—In an indictment against a slave, for the homicide of a white person, the offense may be charged in different counts as murder and manslaughter 389
19. *Sufficiency of indictment in description of offense*.—An indictment, charging that a slave “intentionally, but without malice,” killed a white person, is not sufficient under the provisions of the Code: section 3516, dispensing with the averment of “presumptions of law,” does not dispense with the necessity of averring that the killing was unlawful 389
20. *Sufficiency of indictment in statement of time*.—Under the provisions of the Code, (§ 3512,) an averment of time is not necessary in an indictment, except where time is a material ingredient of the offense; if the offense is charged to have been committed before the finding of the indictment, but after a specified day which is beyond the period prescribed as the limitation of a prosecution, it is nevertheless sufficient on demurrer.—*Molett v. The State* 408
21. *Informer unnecessary*.—A demurrer does not lie to an indictment, because it does not appear to have been preferred at the instance of an informer 408
22. *Limitation of prosecution for misdemeanor*.—When a prosecution for a misdemeanor is commenced by indictment, the indictment must be found (Code, § 3374) within twelve months after the commission of the offense; but, when the defendant is bound over to answer an indictment to be preferred against him, the commencement of the prosecution dates from that time, and not from the time when the indictment is found 408
23. *Returning, endorsing, and filing indictment*.—When an indictment is endorsed by the foreman of the grand jury, “a true bill,” and is shown by the record to have been returned into court so endorsed; and the prisoner, without objecting to the legality or sufficiency of the indictment, pleads not guilty, he cannot move in arrest of judgment, on account of any informality in the finding, returning, or filing of it.—*Russell v. The State* 366
24. *When objection to grand jury may be made*.—Although the statute (Code, § 3591) requires that an objection to an indictment, because the grand jurors were not drawn in the presence of the officers designated by law, must be made at the term at which the indictment is found; yet, if the prisoner was deprived of the opportunity of making the objection at the proper time, by his confinement in jail in another county, the court may entertain the objection at a subsequent term 366
25. *Prisoner's confinement in jail in another county, at term indictment is found, not good in arrest of judgment*.—The fact that the prisoner, at the term at which the indictment was found against

CRIMINAL LAW—CONTINUED.

- him, was confined in the jail of another county, is not good matter in arrest of judgment, when it does not appear that he was thereby deprived of any legal right..... 366
26. *Personal presence of prisoner in court.*—In capital cases, it is the safer practice to have the prisoner personally present in court, when the day for his trial is set, and when the order for summoning the jury is made.—*Henry v. The State*..... 389
27. *Form and sufficiency of plea of former acquittal or conviction.*—In a plea averring a former conviction or acquittal, the former indictment must be set out in full, and the conviction or acquittal under it; and there must be an averment of the identity of the prisoner, and of the offense charged in the two indictments... 389
28. *Practice in trying issue on plea of former acquittal or conviction.* When a former conviction or acquittal and not guilty are pleaded in a criminal case, the former issue must be disposed of before the latter is put to the jury..... 389
29. *Error without injury in action of court on pleadings.*—Where two special pleas in bar, both substantially the same, and both defective, are interposed by the defendant in a criminal case, and issue is taken on one of them, the failure of the court to require the State to demur, reply, or take issue on the other, is not available to the defendant on error..... 389
30. *Arrest of judgment on former conviction.*—A replication to a plea of *autre fois convict*, in these words, "arrest of judgment," is fatally defective on demurrer: the replication ought to show that the former indictment was insufficient, or that a conviction could not lawfully have been had under it for the offense charged in the second..... 389
31. *Sentence of conviction corrected and affirmed.*—Where the judgment of conviction, in a capital case, does not specify the day on which the prisoner is to be executed, the appellate court, on affirming the judgment, (Code, §§ 3663-64,) will appoint a day of execution.—*Russell v. The State*..... 366
32. *Charges on law of self-defense.*—The prisoner having requested the court to instruct the jury, "that if they believed from the evidence there was a reasonable belief in his mind of some great bodily harm about to be committed on him by the deceased," or "that there was reasonable ground on his part to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, then the killing under the circumstances would be excusable;" and the court having refused to give the charge, "except with the qualification that, if the danger appeared to be imminent or threatening, the prisoner would be excused,"—*held*, that neither the refusal of the charge as asked, nor the qualification added to it, was erroneous.—*Dupree v. The State*..... 380
33. *Admissibility of threats by deceased towards prisoner.*—Threats, made by the deceased a short time before the commission of the

CRIMINAL LAW—CONTINUED.

- homicide, indicating an angry and revengeful spirit towards the prisoner, and a determination to do violence towards his person, which were communicated to the prisoner before the homicide, are admissible evidence for him..... 380
34. *Admissibility of conduct of deceased towards servant or agent of prisoner.*—The conduct of the deceased, in going to the prisoner's premises, several weeks before the commission of the homicide, and there seeking a personal difficulty with a person who was in the employment of the prisoner, is not admissible evidence for the prisoner..... 380
35. *Mode of proving character.*—The bad character of the deceased cannot be established by proof of particular facts, showing misconduct or immorality, having no connection with the case; as that he was an escaped convict from the penitentiary of another State..... 380
36. *Admissibility of prisoner's character as evidence.*—The character of the prisoner, for peaceable disposition and habits, is competent evidence for him..... 380
37. *Competency of witness to testify to character.*—A person who is acquainted with the prisoner's character, and who has known him for eight or ten years, is competent to testify to his character, although he may have resided more than twenty miles distant from the prisoner's residence..... 380
38. *Charge on effect of good character as evidence.*—A charge to the jury, in a criminal prosecution for a misdemeanor, instructing them "that evidence of good character went only to the question of the defendant's guilt, and, if they found him guilty, should not be regarded in mitigation of the fine they might think proper to assess against him," is erroneous..... 354
39. *Receiving stolen goods.*—A charge to the jury, instructing them, in effect, that if the prisoner received the stolen goods under such circumstances that any reasonable man of ordinary observation would have known that they were stolen, and concealed them, then they were authorized to find that he knew they had been stolen, asserts a correct legal proposition.—*Col-lins v. The State*.... 434
40. *Practice in giving further instructions to jury in absence of prisoner's counsel.*—The presiding judge having quit the bench, on finishing the business of the day, while the jury in a criminal case were deliberating on their verdict; and the counsel engaged in the case having left the court-room, under an agreement that the clerk might receive the verdict of the jury,—the fact that the court, on the request of the jury for further instructions, afterwards gave them an additional charge, which asserted a correct legal proposition, in the presence of the prisoner himself, but in the absence of his counsel, and without their knowledge or consent, is not an error which will work a reversal of the judgment..... 434

CRIMINAL LAW—CONTINUED.

41. *Charge referring to jury the meaning of words used by witnesses.*
A physician having testified, that he had made a professional examination of a wound in the prosecutor's hand, but did not "examine" another wound in his side, a charge to the jury, instructing them that "they could consider whether the witness, in saying that he did not *examine* the wound in the side, meant that he did not examine it as a physician, or that he did not see or look at it at all," is not erroneous.—*Rosenbaum v. The State*..... 354
42. *Charge authorizing the jury to consider their own general knowledge and experience.*—A charge to the jury in a criminal case, instructing them that, "in arriving at a correct verdict, they could consult their general knowledge and their own experience in life," is not erroneous..... 354
43. *Objectionable expression in charge withdrawn or explained.*—The presiding judge, in charging the jury, having characterized certain matters relied on for the defense as "*little matters*," (as they had been previously characterized by the prisoner's counsel in his argument to the jury,) this furnishes no cause of reversal, when the record shows that, before the jury retired, the judge told them that, in using the expression, "it was far from the intention of the court to characterize them as small or insignificant, or to indicate in what light they were to be considered and weighed by the jury."..... 354
44. *Admissibility of evidence in extenuation of assault.*—Under an indictment for an assault and battery, the prisoner cannot be allowed to prove what took place between him and the prosecutor at a previous interview in the forenoon of the same day, which is too far removed in point of time from the actual engagement to constitute a part of the *res gestæ*.—*Rosenbaum v. The State*..... 354

CUSTOM.

See EVIDENCE, 41.

DAMAGES.

1. *Recoupment.*—Expenses, necessarily incurred by the hirer, in the successful defense of an action of trover, instituted against him by the owner, for the alleged conversion of the slave during the term, cannot be recouped in a subsequent action on the note given for the hire.—*Deens v. Dunklin*,..... 47
2. *Measure of damages in action on attachment bond.*—In an action on an attachment bond, if the attachment was only wrongfully sued out, the plaintiff is entitled to recover the damage actually sustained, which does not include the injury to his wounded feelings; but if sued out wrongfully and vexatiously, he is entitled also to recover vindictive damages.—*Floyd v. Hamilton*..... 235
3. *Damages against payee and acceptor of bill of exchange.*—In an

DAMAGES—CONTINUED.

action against the payee and endorser of an inland bill of exchange, duly protested for non-payment, the mere fact that the bill was addressed to, and accepted by the defendant, does not relieve him from the payment of damages.—*McKenzie v. Clanton*,..... 528

4. *Charge on question of damages, excluding portion of evidence from consideration of jury, erroneous.*—Plaintiff having introduced a physician as a witness, who testified that, in his opinion, the slave whose soundness was in controversy was diseased at the time of the sale, and valueless; and there being no evidence of the actual value of the slave at that time, if she was not valueless,—it is error in the court to instruct the jury, “that if they were satisfied that the slave was unsound at the time of the sale, and if they believed the testimony of said physician as to her worthlessness, then they must find the full value of the slave for the plaintiff, although, on the whole proof, they might believe that the disease did not render her wholly valueless.” *Holloway v. Cotten*,..... 529

DEEDS.

1. *Conveyance of wife's separate estate.*—A bill of sale for a slave belonging to the wife's separate estate, executed by husband and wife, attested by only one witness, and not shown to be under seal, is not sufficient, under the provisions either of the Code or of the act of 1850, to pass the title of the wife when a minor.—*Whitman v. Abernathy*,..... 154
2. *Construction of deed of gift.*—A deed of gift, by which a father conveyed a slave to a trustee, in trust for the sole use and benefit of his daughter Eliza Jane, then a married woman, “for and during the time which she shall remain the wife of the said David,” her husband; “and if the said Eliza Jane shall die before her said husband, then to the sole use and benefit of the heirs of her body forever; which said hire and profit of said negro, and the use and benefit thereof, to the said Eliza Jane as aforesaid, are, from time to time, and at all times during the coverture, to be and remain to the sole and separate use and enjoyment of the said Eliza Jane during her life, and after her death to the heirs of her body,”—vests an absolute title in the daughter.—*McCullough v. Gliddon*,..... 208
3. *Cancellation of deed.*—The mere cancellation of a deed does not divest the title of the grantee, nor does it enable the grantor, by a subsequent conveyance, to pass the title to one who is not shown to be a bona-fide purchaser or incumbrancer without notice of the canceled deed.—*Fawcetts v. Kimney*,..... 261
4. *Predicate for secondary evidence of deed.*—The grantee being presumed to have the custody of a deed, the fact that he fled from the State, eight or nine years ago, as a fugitive from justice, and has not since been heard of, is a sufficient excuse for the

DEEDS—CONTINUED.

- non-production of the deed by one claiming under a purchase at execution sale against him.—*Shorter v. Sheppard*..... 648
5. *Secondary evidence of execution and contents of lost deed*.—The oral admissions of the grantee, as detailed by witnesses twelve or thirteen years after they were made, to the effect “that he had given up the property, the times being hard, and he being unable to make his payments;” “that he had given all the lands back to his uncle;” “that he had parted with all the rights he had to the lands, and to his uncle;” and “that he had re-conveyed all the lands back to his uncle;”—held insufficient, under all the circumstances of the case, to establish the execution and contents of a re-conveyance of the lands..... 648
6. *Admissibility of sheriff's deed as evidence*.—The admissibility of a sheriff's deed, as evidence for the purchaser at execution sale, is not affected by a variance between the judgment and execution under which the sale was made, and the recitals thereof in the deed.—*Wilson v. Campbell*,..... 249
7. *Registration of assignment of patent-right*.—The registration of an assignment of a patent-right, under the acts of congress, is only necessary by way of notice to subsequent purchasers from the assignors: as between the parties and strangers, the failure to record the assignment does not affect its validity.—*Black v. Stone & Co.*..... 327
8. *Proviso to registration law, respecting property removed from another State*.—The statute of 1823, (Clay's Digest, 255, § 4.) postponing the lien of an unrecorded mortgage in favor of creditors without notice, contains an express exception as to persons “who shall have removed from another State;” consequently, it has no application where the mortgagee files a bill to enforce his lien within twelve months after the property is brought into this State.—*Donald & Co. v. Hewitt*,..... 534
9. *Kentucky registration statute construed*.—The registration law of Kentucky, relative to “deeds of mortgage or deeds of trust,” as pleaded in this case, applies to an equitable mortgage, which merely creates a charge on property..... 534
10. *Validity of trust deed*.—A deed of trust, executed before the adoption of the Code, by which a debtor conveyed all his property to a trustee, in trust for the payment of his debts and the support of his wife and children, is not fraudulent on its face as against creditors; the provision for the payment of debts not being vitiated by the provision for the benefit of the grantor's family.—*Green v. Br. Bank at Montgomery*,..... 643
11. *Validity of sale for taxes*.—The appellate court cannot affirm the validity of a sale and conveyance of land by a city tax-collector, when the record only sets out his deed to the purchaser. *Collins v. Doe d. Robinson*,..... 91
12. *Validity of patent*.—A patent from the United States government, which recites that a Creek Indian “became entitled” to

DEEDS—CONTINUED.

- land under the provisions of the treaty of 1832, and that the land was afterwards sold under the provisions of the act of congress of March 3, 1837, authorizing the sale by the government of unsold reservations, cannot be pronounced void on its face.—*Rose v. Griffin*,..... 717
13. *Validity of mortgage impeached for fraud*.—A mortgage, founded on valuable and adequate consideration, will not be declared void for fraud, when assailed by a subsequent purchaser at execution sale against the mortgagor, on proof of the mortgagor's embarrassed condition and relationship to the mortgagee.—*Troy v. Smith & Shields*,..... 469
14. *Validity of mortgage not affected by changing form of security, or blending new debt*.—The validity of an equitable mortgage, created by contract, is not affected by the fact that the notes actually given did not correspond with those contemplated when the contract was made, or that they were made to include an additional indebtedness not provided for by the contract. *Donald & Co. v. Hewitt*,..... 534
15. *Fraudulent deed not reformed*.—A court of equity will not, at the instance of the grantor, declare a deed, absolute on its face, to be a mortgage or trust, when the evidence shows that the transaction was intended by the parties to delay, hinder or defraud the grantor's creditors.—*May v. May's Adm'r*...,..... 203
16. *Equitable relief against mistake or fraud in obtaining conveyance*. If a purchaser of an undivided half interest in a tract of land, by mistake or fraud, and without the knowledge or consent of his vendor, obtains a conveyance of the absolute property, a court of equity will direct a re-conveyance to the vendor of an undivided half interest.—*Armour v. Lose*,..... 317

DEPOSITIONS.

1. *Objection to deposition good in part only*.—A motion to suppress two depositions, on a specified ground which is not well taken as to one of them, may be overruled entirely.—*Bartee v. James*, 34
2. *Specific objection to deposition*.—A motion to suppress a deposition on a specified ground is a waiver of all other grounds of objection.. 34
3. *When motion to suppress must be made*.—A motion to suppress a deposition, on account of the incompetency of the witness from interest, comes too late (Code, § 2328) when the deposition is offered on the trial.—*Thompson v. Rawles*,..... 29
4. *Motion to suppress on account of defective statement of case*.—In a *qui-tam* action under section 1953 of the Code, it is no ground for the suppression of a deposition taken by the plaintiff, that neither the commission nor the interrogatories show the character of the action.—*Cotten v. Rutledge*,..... 110
5. *Motion to suppress on account of defective execution of commission*. A deposition will be suppressed on motion, when it appears

DEPOSITIONS—CONTINUED.

- from the certificate of the commissioner that the witness died before signing it; the commissioner testifying, also, that the witness took the interrogatories away with him, and returned the answers to him already written out, but never subscribed or verified them by oath.—*Wilson v. Campbell*,..... 249
6. *Motion to suppress on account of incompetency of commissioner.* A deposition, taken in Texas, will not be suppressed on account of the incompetency of the commissioner by whom it was taken, on proof of the simple fact that a person of the same name, who had lived in Alabama, was a brother-in-law of one of the parties to the suit.—*Blakey v. Blakey*,..... 611
7. *Responsiveness of answer to interrogatory.*—In answer to an interrogatory, calling on the witness to state, if he heard a particular conversation relative to the plaintiff, "how it occurred, and what it was, and who were present," an answer in these words, "I have no recollection at this time of the plaintiff's name being mentioned in the conversation had on that day," although not full and satisfactory, is responsive to the interrogatory. *Smith v. Gaffard*,..... 168

DIVORCE.

1. *Proof of plaintiff's residence.*—To entitle a party to a divorce, (Code, § 1969,) when the defendant is a non-resident, the plaintiff must allege and prove his own *bona-fide* residence in this State for one year next before the filing of the bill.—*Crossman v. Crossman*,..... 486
2. *What constitutes abandonment.*—The husband cannot obtain a divorce on the ground of abandonment, (Code, § 1961,) on proof that he removed to this State more than twenty years before the filing of his bill, and that his wife afterwards refused to comply with her promise to follow him: he must show a refusal on her part to live with him for three years next before the commencement of the suit..... 486
3. *Abandonment of wife by husband entitles her to alimony.*—The legal abandonment of the wife by the husband, in driving her forth from his home without justifiable cause, and failing to furnish her with the means of support, entitles her to a decree for alimony.—*Mims v. Mims*,..... 98
Also, *Wray v. Wray*,.... 187
4. *Insanity excuses adultery.*—Adultery, committed by the wife while insane, is no bar to her claim for alimony..... 98, 187

DOWER.

1. *Compensation for dower.*—Where the probate court decrees to the widow, as compensation for her dower interest in the lands of her deceased husband, which were sold with her consent, (Code, §§ 1873-75,) one-ninth of the purchase-money, with interest, the appellate court cannot hold the allowance inadequate,

DOWER—CONTINUED.

when it appears that, however healthy she may be, the widow is thirty-seven years of age.—*Sherard v. Sherard's Adm'r*..... 488

EJECTMENT.

1. *When vendor may maintain ejectment against purchaser.*—A purchaser of land, holding only his vendor's bond for title, cannot defeat an ejectment by the latter, although the sale was made under a mortgage and the entire purchase money has been paid; nor does a sub-purchaser from him occupy any better position. *Collins v. Doe d. Robinson*,..... 91
2. *When mortgagee may maintain ejectment.*—Authorities cited by the court on the question, whether a mortgagee may maintain ejectment after payment of the mortgage debt..... 91
3. *Limitation of action.*—There is no statute of limitations of force in this State, applicable to an action of ejectment commenced within one year after the adoption of the Code, (January 17, 1853,) unless a bar was perfected under the statute which existed before the passage of the act of 1843..... 91
4. *Admissibility of execution as evidence for purchaser at sheriff's sale.*—In ejectment against a purchaser at sheriff's sale, the execution under which the sale was made, being regular on its face, is admissible evidence for him, although its validity is controverted on the ground that the plaintiff therein was dead when it issued.—*Wilson v. Campbell*,..... 249

ELECTION.

1. *Election by distributees to ratify conversion by administrator.*—If an administrator converts the assets of the estate into other specific property, the distributees may, at their election, either charge him with the value of the converted assets, or pursue and claim the specific property obtained in exchange.—*Blackwell v. Blackwell*..... 57
2. *Election in matter of equitable conversion.*—Where land is directed by will to be sold and converted into money, although a court of equity will consider and treat it as money, the parties interested may, at their election, re-convert the property into land; but such re-conversion can only be made by all the parties interested, and not by each separately for himself.—*High v. Worley*..... 196
3. *Same.*—The distributees of a deceased legatee cannot make such election, without showing that the absence of debts renders administration on the estate of the legatee unnecessary; nor can a married woman, not owning a separate estate by statute, make such election for herself, although she is living separate and apart from her husband..... 196

ERROR AND APPEAL.

I. WHEN APPEAL LIES.

. *From probate decree.*—"We do not assent to the proposition,

ERROR AND APPEAL—CONTINUED.

that this court has no power to revise the decisions of the probate court in this class of cases;" *i. e.*, in the matter of an application by the widow, on final settlement of the estate of her deceased husband, for compensation on account of her dower interest in the lands which were sold.—*Sherard v. Sherard's Adm'r*..... 488

II. BOND, AND SECURITY FOR COSTS.

2. *Sufficiency of appeal bond*.—Where a married woman takes an appeal, from a judgment in an action at law against her and her husband, she may execute an appeal bond in her own name, without joining her husband.—*Childress and Wife v. Taylor*... 185
3. *Same*.—A bond, conditioned as *supersedeas* bonds usually are, is a sufficient security for the costs of an appeal, (Code, § 3041,) although the decree appealed from is one which cannot be superseded.—*McCollum v. McCollum's Executor*..... 711
4. *Same*.—If an appeal bond describes the judgment as having been rendered against the appellant and her husband, when the record shows that it was rendered against her alone, the appeal will be dismissed on motion.—*Burdine v. Mustin*..... 634
5. *Implied waiver of defective appeal bond*.—The filing of a brief by the appellee's attorney, in which he discusses the merits of the case, and, at the same time, insists that the appeal ought to be dismissed, is not equivalent to a joinder in error, nor is it an implied waiver of defects in the appeal bond..... 634

III. LIMITATION.

6. *Under act of 1854*.—The act of February 15, 1854, (Session Acts 1853–54, p. 71,) "to modify the operation of the statute of limitations," in its application to "causes of action" accruing prior to the 17th January, 1853, embraces appeals. (Overruling *Green v. Maclin*, 29 Ala. 695.)—*Lewis' Adm'r v. Lindsay's Adm'r*..... 304

IV. PRACTICE.

7. *What constitutes record in sci. fa. against bail*.—A recognizance copied into the transcript by the clerk, but not made part of the record by exceptions or appropriate reference, cannot be looked to as part of the record of the proceedings against bail on their forfeited undertaking.—*Cantline v. The State*..... 439
8. *Amendment of judgment pending appeal*.—When a judgment is amended *nun pro tunc*, after an appeal has been sued out, by the addition of another party defendant, the amendment will be considered as relating back to the date of the original judgment, for the purpose of bringing up the entire case with the new party, but not for the purpose of defeating the appeal on account of the want of proper parties, or a misdescription of the judgment in the appeal bond.—*Farmer v. Wilson*..... 446

ERROR AND APPEAL—CONTINUED.

9. *Substantial defect in complaint available on error after judgment by default.*—When the complaint does not show a substantial cause of action, the judgment will be reversed on error, although it was rendered by default without objection.—*Childress v. Mann & Co.*..... 206
10. *Error without injury in action of court on pleadings.*—Where two special pleas in bar, both substantially the same, and both defective, are interposed by the defendant in a criminal case, and issue is taken on one of them, the failure of the court to require the State to demur, reply, or take issue on the other, is not available to the defendant on error.—*Henry v. The State.*.. 389
11. *Refusal of charge on effect of evidence.*—The refusal of a charge on the effect of the evidence, at the request of a party in whose favor the undisputed facts of the case established a legal conclusion, is an error which will work a reversal of the judgment, unless the record shows some sufficient legal reason for the refusal.—*Rhodes v. Otis* 578
12. *Appeal in probate cases tried on bill of exceptions.*—An appeal from a decree of the probate court, rendered on the final settlement of an administrator's accounts, is required to be tried on the bill of exceptions, (Code, § 1891;) consequently, the appellate court will not look to other parts of the record, for supposed errors not disclosed by the bill of exceptions.—*Bartee and Wife v. James*..... 34
13. *Presumption in favor of ruling of primary court.*—Where the admissibility of evidence depends upon the other evidence then before the court, and the bill of exceptions does not show whether, at the time it was admitted, the other evidence which authorized its admission was before the court or had been excluded, the appellate court will make that intendment which may be necessary to sustain the ruling of the primary court. *Smith v. Gaffard*..... 168
14. *Same.*—On motion to nonsuit the plaintiff, because the verdict in his favor is less than fifty dollars, (Code, § 2365,) if the record does not show on what ground the motion was overruled, and contains no bill of exceptions or statutory affidavit, the appellate court will presume that the action of the primary court was predicated on a good and sufficient reason.—*Wynn v. Simmons*..... 272
15. *Same.*—Where the judgment final, in *scire facias* against bail, recites the issue and return of an *alias scire facias*, but the *alias* itself is not set out in the transcript, the appellate court will presume that the recitals are true, and that the *alias* has been lost.—*Cantaline v. The State*..... 439
16. *Same.*—When the bill of exceptions does not purport to set out all the evidence, the appellate court will presume that an affirmative charge was not abstract.—*Nesbitt v. Pearson's Adm'r*, 668
17. *Conclusiveness of judicial decisions.*—An opinion of the supreme

ERROR AND APPEAL—CONTINUED.

- court, whether right or wrong, is the law of the case in which it is pronounced, and is not open to revision on a second appeal; consequently, if that opinion asserted that, upon all the evidence set out in the bill of exceptions, the court below might have instructed the jury that the plaintiff was not entitled to recover, it is conclusive against the plaintiff's right of recovery on every aspect of the case which that evidence tended to establish, whether presented by the pleadings or by the instructions to the jury.—*City Council of Montgomery v. Gilmer & Taylor*..... 116
18. *Same*.—On a second appeal in a cause, the appellate court must be governed by the points and principles settled and decided on the former appeal, unless the record shows so material a change of the case as renders them inapplicable; nor can error be imputed to the inferior court, so far as its subsequent proceedings conform to those points and principles. *Malone v. Carroll*..... 191

V. JUDGMENT.

19. *Reversal in part*.—On appeal by the defendant from a judgment of the circuit court, overruling his demurrer to the plaintiff's evidence, and rendering judgment final, without the intervention of the jury, for the amount of the account sued on; the appellate court, while reversing the latter part of the judgment, and remanding the cause that the damages may be ascertained by a jury, will not disturb the judgment on the demurrer, if it be correct.—*Patterson v. Blakeney*..... 338
20. *Sentence of conviction corrected and affirmed*.—Where the judgment of conviction, in a capital case, does not specify the day on which the prisoner is to be executed, the appellate court, on affirming the judgment, (Code, §§ 3663–64,) will appoint the day of execution.—*Russell v. The State*..... 366

ESTATES OF DECEDENTS.

1. *Presentation of claim*.—Where it appears that an execution against an administrator, on a judgment recovered against his intestate in his lifetime, was placed in the hands of the sheriff, and that the administrator, on seeing the execution, applied to the creditor for indulgence, which was granted to him,—this is sufficient proof of a presentation of the demand to avoid a plea of the statute of non-claim.—*Harrison's Adm'r v. Jones' Adm'r*. 258
2. *Jurisdiction of orphans' court to sell real estate of decedent*.—The orphans' court has no jurisdiction to order the sale of land, to which the decedent had a pre-emption claim at the time of his death, when it appears that he died before perfecting his claim, and that his administrator afterwards obtained a certificate of entry in his name, by the payment of money advanced by third persons, under a contract with the administrator that the land

ESTATES OF DECEDENTS—CONTINUED.

- should be sold under an order of court for their reimbursement, the decedent's estate being insolvent.—*Cothran v. McCoy's Heirs*..... 65
3. *Same*.—The orphans' court has no jurisdiction to order the sale of lands, to which the decedent had a pre-emption claim at the time of his death, and which were afterwards entered by his administrator in the name of his heirs.—*Burns v. Hamilton's Adm'r*..... 210
4. *Jurisdiction of probate court to sell personal estate*.—Under the act of 1854, (Session Acts 1853-4, p. 45,) the probate court has no authority to order the sale of a decedent's personal estate, for the purpose of making distribution, when that power is vested in the executor by the will.—*McCollum v. McCollum's Executor*..... 711
5. *Validity of order of sale of personalty by probate court*.—An order for the sale of slaves belonging to a decedent's estate, granted by the probate court on the application of the administrator, which application shows on its face that a sale was necessary for the purpose of paying the debts of the estate, is valid. *Hatcher's Adm'r v. Clifton*..... 301
6. *Presumption in favor of regularity of sale*.—In an action brought by an administrator *de bonis non*, against one claiming under a purchase at a public sale by the administrator in chief, the regularity of the sale, and of the order under which it was made, may be presumed from the lapse of twenty years, accompanied with proof of adverse possession under the sale for that length of time, and of the fact that the records of the court were loosely kept about the time when the order of sale was made.—*Wyatt's Adm'r v. Scott*..... 313
7. *Jurisdiction of equity to make settlement and distribution*.—The chancery and probate courts having concurrent jurisdiction over the settlement of decedents' estates, the former court will not, in the absence of special equities, take jurisdiction of a final settlement which has already been commenced in the probate court.—*Moore v. Lesueur and Wife*,..... 237

ESTOPPEL.

1. *En pais against hirer of slave*.—The recovery of a judgment in trover, by the owner against the hirer, for the conversion of a hired slave during the term, together with satisfaction thereof, establishes a rescission of the contract, and estops the plaintiff from afterwards maintaining an action on the note given for the hire; but the mere institution of an action of trover has no such effect, when the action is shown to have been successfully defended on the merits.—*Deens v. Dunklin*..... 47
2. *Equitable estoppel against assertion of vendor's lien*.—A court of equity will not enforce a lien for the unpaid purchase-money of land, at the suit of an administrator of the deceased vendor,

ESTOPPEL—CONTINUED.

when it appears that the purchaser also is dead ; that his estate was duly declared insolvent, and settled as such ; that the land was sold, under an order of the probate court, as belonging to his estate ; that the vendor's administrator was a bidder at the sale, and publicly stated that the purchaser would get a good title ; and that he filed the notes for the purchase-money as claims against the purchaser's estate, and received his *pro-rata* share of the proceeds of the sale of the land, which he does not offer in his bill to return or account for.—Williamson's Adm'r v. Ross,..... 509

3. *Estoppel by judgment*.—When the recitals of a judgment against a partnership, confessed by one of the partners, show that he had special authority to do so, the other partners are estopped, in an action on the judgment, from denying the truth of the recital.—Elliott v. Holbrook, Carter & Co. 659
4. *When license is irrevocable*.—A parol license to float spars down a private stream, obtained for valuable consideration, cannot be revoked by the grantor, when the grantee, having acted under it, would be injured by the revocation : the doctrine of estoppels *en pais* applies to such a case.—Rhodes v. Otis. 578

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Words spoken after commencement of suit in slander*.—In an action for verbal slander, the repetition of the slanderous words charged, or the speaking of other words which are of similar import, or which expressly refer to the words charged, after the commencement of the suit, is admissible evidence for the plaintiff, as tending to show malice ; *secus*, as to other words spoken after suit brought.—Parmer v. Anderson. 78
2. *Evidence showing sense in which words were understood by hearers*. Where the words charged in the declaration are not, *per se*, actionable, and are not averred to have been intended to impute a slander, or to have been so understood by the hearers, the plaintiff cannot be permitted to prove the sense in which they were understood by the hearers, so as to convert them into a slanderous charge.—Smith v. Gaffard. 168
3. *Relevancy of evidence affecting title of purchaser*.—In ejectment by the vendor, against one claiming under the purchaser, if it appears that no conveyance was executed to the purchaser, the fact that he paid the purchase-money is immaterial and irrelevant, since such payment could not confer on him any legal title.—Collins v. Doe d. Robinson. 91
4. *Relevancy of evidence in action against municipal corporation for negligence*.—In an action against a municipal corporation, for damages caused by its neglect of duty in repairing streets and constructing sewers, it is competent for the plaintiff to prove notice to it of the condition of the street,

EVIDENCE—CONTINUED.

- and its failure or refusal to repair; but evidence showing the motives which influenced the individual members of the corporation in refusing to support a proposition to repair, or that they were influenced by malice towards the plaintiffs, is irrelevant and inadmissible.—*City Council of Montgomery v. Gilmer & Taylor*..... 116
5. *Same*.—The fact that the corporation was informed, at a meeting of its council, through the report of one of its committees, that some slight repairs had been made upon a ravine in the street, is admissible evidence for the plaintiffs, as tending to show a recognition of the street by the corporation, as well as notice to it of the character of the repairs..... 116
6. *Evidence of debtor's pecuniary condition in action on attachment bond*.—In such action, the defendant cannot be permitted to prove that the plaintiff, when the attachment was sued out against him, was embarrassed in his pecuniary affairs and pressed for money, unless the relevancy of the evidence is shown by its connection with some question of fraud.—*Floyd v. Hamilton*..... 235
7. *Admissibility of partnership accounts against third persons as affecting liability of person as partner*.—In an action against several persons, as partners, on a promissory note executed in the name of the partnership, accounts contracted by third persons with the partnership, under its different firm names, are not, *prima facie*, competent evidence against one of the defendants, who pleads *non est factum* and the general issue.—*Rabby & Co. v. O'Grady*..... 255
8. *Relevancy of evidence affecting question of undue influence*.—Where one of the issues is, whether the will propounded for probate was procured by undue influence; and evidence has been adduced showing that one of the slaves, whom the testator directed to be carried to a non-slaveholding State and there emancipated, making her one of his legatees, had influence over him, and a motive to exercise it in procuring such a will,—it is competent for the proponent to prove who was the reputed father of said slave, and that her reputed father had given the testator, on his removal to this State, fifteen or twenty likely negroes.—*Pool's Heirs v. Pool's Ex'r*..... 145
9. *Relevancy of evidence to prove undue influence or insanity*.—The fact that the testator, several months after the execution of his will, executed a deed conveying all his property to a trustee, to be managed and controlled for him, and that this was done, at the instance of his friends, for the purpose of placing him in an advantageous position to contest the validity of a contract which he had previously made, is relevant evidence for the contestants, as affecting the question of the testator's mental capacity and susceptibility of influence from others.—*Stubbs v. Houston*..... 555

EVIDENCE—CONTINUED.

10. *Same*.—Whether a will is natural, is a legitimate inquiry, when its validity is contested on the grounds of undue influence and insanity; and, as affecting that question, the pecuniary circumstances of the testator's nephews, who, in the event of his intestacy, would have been the distributees of his estate, are relevant and pertinent evidence..... 555
11. *Same*.—The fact that the testator, after the execution of the paper propounded as his will, gave a mortgage to secure a debt not really due, is also competent evidence for the contestants, as bearing on the question of his intellectual condition and capacity..... 555
12. *When witness may testify to ignorance of fact*.—Where the situation of a witness was such that, if a certain fact had existed, he would probably have known it, his want of knowledge is some evidence (though slight) that it did not exist; and he will be allowed to testify, in such case, that if the fact existed, he did not know it.—*Blakey's Heirs v. Blakey's Executrix*..... 611
13. *Admissibility of garnishee's answer*.—When the answer of a garnishee is contested by the attaching creditor, although the *onus* is on the plaintiff, the answer itself is not evidence for the garnishee.—*Sevier v. Throckmorton*..... 512
14. *Admissibility of execution as evidence for purchaser at sheriff's sale*. In ejectment against a purchaser at sheriff's sale, the execution under which the sale was made, being regular on its face, is admissible evidence for him, although its validity is controverted on the ground that the plaintiff therein was dead when it was issued.—*Wilson v. Campbell*..... 249

II. ADMISSIONS, DECLARATIONS, HEARSAY, RES GESTÆ.

15. *Implied admission*.—A conversation between the plaintiff's agent and the defendant, relative to the bill of exchange on which the latter was sought to be charged as acceptor, under an acceptance by another as his agent; in which conversation, the defendant did not deny his liability on the acceptance, but asserted that a third person, to whom he had sold the steamboat, ought to pay a part of the amount, because the bill was drawn on account of the insurance of the boat, and the policy was unexpired at the time the boat was sold,—is competent evidence against the defendant, as an implied admission of his liability on the acceptance.—*May v. Hewitt, Norton & Co.*..... 161
16. *Admissibility of evidence in explanation of admission*.—Plaintiff having proved an admission by defendant of what he had said, in a conversation between his brother and himself, relative to the plaintiff, it is competent for the defendant, in rebuttal of any inference of malice from the words used by him, to prove what he did actually say in the conversation with his brother, and the circumstances under which it was said.—*Smith v. Gaffard*..... 168

EVIDENCE—CONTINUED.

17. *Whole conversation admissible evidence, when part has been proved.*
Plaintiff having proved, that when his agent called on defendant, and mentioned to him the subject of the plaintiff's claim, defendant said, that he would start in a few days to the place of plaintiff's residence, and would there see him about it,—it is competent for the defendant to show that, in the same conversation, he said he had a receipt against the claim.—*Scruggs v. Bibb* 481
18. *Attorney's authority to make admissions.*—An agreement or admission of counsel, as to the conduct of a trial in court, has the same binding efficacy as if made by the party himself.—*Rosenbaum v. The State*..... 354
19. *Admissibility of transferror's declarations as evidence against transferee.*—In an action brought by the assignee against the maker of a promissory note, the defendant seeking to establish as a set-off a note executed by the assignor to a third person, and transferred by the latter to the defendant, a memorandum, written on the latter note by the plaintiff's assignor, stating that said note, if "taken up" by the defendant, should be credited on the note of the latter to him, is competent evidence for the defendant, if shown to have been made before the transfer of the note sued on.—*Grayson v. Glover*..... 182
20. *Admissibility of proponent's declarations as evidence against will.*
The declarations of the proponent, he not being the sole legatee, are not competent evidence to defeat the probate of a will, when all the other legatees are neither contesting parties, nor consent to the admission of the declarations.—*Blakey's Heirs v. Blakey's Executrix*..... 611
21. *Admissibility of slave's declarations.*—The declarations of a slave, complaining of sickness, and detailing her symptoms, are competent evidence on the principle of *res gestæ*, as well as from the necessity of the case, though made to a person who is not a physician; *secus*, as to her declarations, to the effect "that she had been that way, off and on, for the last year or two." *Holloway v. Cotten*..... 529
22. *Calling for question and answer when hearsay.*—The fact that a party, in examining a witness, calls for a question propounded by the witness to a third person, gives him no right to call for the reply, which, under such circumstances, is mere hearsay. *Floyd v. Hamilton*..... 435
23. *General notoriety admissible to prove knowledge of fact.*—The fact that the intemperate habits of the person to whom the liquor was sold were notorious in the neighborhood in which the defendant lived, is proper evidence for the consideration of the jury in determining whether his habits were known to the defendant.—*Stallings v. The State*..... 425

EVIDENCE—CONTINUED.

III. BURDEN, WEIGHT, AND SUFFICIENCY.

24. *Burden of proof on question whether stream is navigable.*—All streams below tide-water being, *prima facie*, public, while all above it are, *prima facie*, private, the *onus* of proof is on a party who claims that a stream above tide-water is navigable. Rhodes v. Otis..... 578
25. *Burden of proof as to testator's capacity.*—When the probate of a will is contested on the ground of the insanity or mental incapacity of the testator, it is not incumbent on the proponent, in making up the issues, to affirm that the testator was of sound mind; nor is the *onus* on him of proving sanity.—Stubbs v. Houston..... 555
26. *Proof of plaintiff's ownership.*—In an action by the assignee against the maker of a note, the plaintiff is not required to prove his ownership, unless it is denied by a sworn plea.—Nesbitt v. Pearson's Adm'rs..... 668
Also, Smith v. Harrison..... 706
27. *Effect of receipt as evidence.*—A receipt in full of all claims due up to its date is presumptive evidence of the payment of a demand then past maturity, and throws on the creditor the burden of proving that such demand was not in fact included in it. Scruggs v. Bibb..... 481
28. *Charge on effect of good character as evidence.*—A charge to the jury, in a criminal prosecution for a misdemeanor, instructing them "that evidence of good character went only to the question of the defendant's guilt, and, if they found him guilty, should not be regarded in mitigation of the fine they might think proper to assess against him," is erroneous.—Rosenbaum v. The State..... 354
29. *Identification and proof of contents of lost bank-notes.*—In an action to recover the value of bank-notes lost or destroyed, it is incumbent on the plaintiff to first prove the existence and loss of the notes, and then to adduce proof of their contents; and proof of their aggregate amount and issue by the bank, without other evidence of their identity and contents, is not sufficient to authorize a recovery.—Bank of Mobile v. Meagher & Co..... 622
30. *Proof of payment by administrator.*—The creditor's receipt is sufficient to entitle the administrator to a credit for the payment of the demand, although it appears that the matter is left open for adjustment on settlement of their private accounts.—Henderson v. Simmons..... 291

IV. MATTERS JUDICIALLY KNOWN.

31. *Charter of corporation.*—The charter of a female college, which is a private corporation, cannot be judicially noticed by the appellate court.—Drake v. Flewellen & Co..... 106

EVIDENCE—CONTINUED.

32. *Judicial officers.*—The supreme court will take judicial notice of the resignation of a circuit judge.—*Ex parte Peterson*. . . . 74
33. *Time.*—Courts will take judicial notice of the coincidence of the days of the month with days of the week, as shown by the almanac.—*Sprowl v. Lawrence*. 674
34. *Form of bank-notes.*—Courts will take judicial notice of the fact, that bank-notes are payable on demand.—*Bank of Mobile v. Meagher & Co*. 622

V. OBJECTIONS.

35. *Demurrer.*—On demurrer to the plaintiff's evidence, and issue joined thereon, the question for the decision of the court is, whether, allowing every intendment which could be made in the plaintiff's favor, the jury might legally render a verdict for him on the evidence.—*Bates' Adm'r v. Bates*. 102
36. *Same.*—When issue is joined on demurrer to the plaintiff's evidence, in an action on an open account, it is the duty of the court to overrule the demurrer, if the jury might, from the evidence, legally find even nominal damages for the plaintiff. *Patterson v. Blakeney*. 338
37. *General offer of evidence partly illegal.*—When evidence is offered, of which a portion is illegal, the court may reject it all, and is not bound to separate the legal from the illegal part. *Jeans v. Lawler*. 340
38. *Admissibility of evidence for single purpose only.*—When the court has admitted evidence which is competent for but one purpose, the opposite party, instead of moving its exclusion, should ask the court to limit its effect by appropriate instructions to the jury.—*Scruggs v. Bibb*. 481

VI. OPINION.

39. *Opinion of witness as expert.*—A practical brick-mason, who had aided in the construction of plaintiff's wall, may be asked his opinion as an expert, whether the quantity of rain which fell on plaintiff's premises within the wall was sufficient to wash it down.—*City Council of Montgomery v. Gilmer and Taylor*. . . 116
40. *When witness may give opinion as to testator's sanity.*—A witness who had known the testator from childhood, and been intimate with him, is competent to give his opinion as to the latter's mental *status* generally, although he seldom saw him during the two or three months which immediately preceded the execution of the will.—*Stubbs v. Houston*. 555
41. *Same.*—The fact that a witness, who had an opportunity of forming a correct judgment of the testator's sanity, is unable to state all the circumstances on which his opinion is predicated, or that the circumstances stated by him do not justify his opinion, does not authorize the court to exclude his opinion as evidence, or to instruct the jury to disregard it. 555

EVIDENCE—CONTINUED.

42. *Custom not proved by opinion of witness.*—A custom of trade, limiting the liability of the owners of a steamboat for cash-letters, cannot be established by the opinions of witnesses, to the effect that the clerk only is responsible.—*Garey v. Meagher & Co.*..... 630
43. *Secus as to value of services.*—When an administrator claims to retain for the value of certain services rendered to his intestate during several years before the death of the latter, in superintending the farm, making contracts for him, attending to his negroes, &c., he may prove the yearly value of such services by the opinion of witnesses.—*Parker's Heirs v. Parker's Adm'r* 459

VII. PAROL AND WRITTEN.

44. *Admissibility of parol evidence to explain acceptance of bill.*—In an action against the owner of a steamboat, seeking to charge him as the acceptor of a bill of exchange, which was drawn by the clerk on the owner, and accepted by the captain, if it is doubtful from the face of the bill whether the acceptance imports a personal liability on the captain, parol evidence is admissible to show that such acceptance was intended to bind the owner, and that he authorized it to be made in that name and form.—*May v. Hewitt, Norton & Co.*..... 161
45. *Admissibility of parol evidence to explain terms of written lease.* In an action between landlord and tenant, parol evidence is not admissible, to show that the words, "the said house is to be furnished with gas," as used in the written lease, meant that the landlord should supply gas-fixtures, and not that he should pay for the gas consumed in the house.—*Thorpe v. Sughi.*... 330
46. *Admissibility of parol evidence to affect award.*—On motion to have an award entered up as the judgment of the circuit court, the oral testimony of one of the arbitrators, contradicting one of the facts recited in the award as having been ascertained by the arbitrators, is inadmissible; the award not being assailed for fraud, partiality, or corruption.—*King v. Jemison.*..... 499
47. *Admissibility of parol evidence to affect record.*—On motion to amend a judgment *nunc pro tunc*, parol evidence is not admissible to prove facts not shown by the record.—*West v. Gallo-way's Adm'r.*..... 306
48. *Same.*—On motion to amend a record *nunc pro tunc*, so as to make it show that a judgment by default was rendered on the fourth, instead of the third day of the term, the correctness of the entries on the minutes of the court, showing the meeting and adjournment of the court, and the day on which the judgment was rendered, cannot be contradicted or impeached by parol testimony, which does not show fraud.—*Courson v. Her-rin's Adm'r.*.... 553

EVIDENCE—CONTINUED.

VIII. PARTIES.

49. *Failure of party to answer interrogatories.*—If the plaintiff fails to answer interrogatories propounded to him by the defendant, the court is not required to dismiss his suit, (Code, § 2334,) but may either continue the cause until full answers are made, or compel an answer by attachment, or direct a non-suit.—*Ex parte McLendon*..... 276

IX. PRIMARY AND SECONDARY.

50. *Predicate for secondary evidence of deed.*—The grantee being presumed to have the custody of a deed, the fact that he fled from the State, eight or nine years ago, as a fugitive from justice, and has not since been heard of, is a sufficient excuse for the non-production of the deed by one claiming under a purchase at execution sale against him.—*Shorter v. Sheppard*..... 648
51. *Secondary evidence of execution and contents of lost deed.*—The oral admissions of the grantee, as detailed by witnesses twelve or thirteen years after they were made, to the effect "that he had given up the property, the times being hard, and he being unable to make his payments;" "that he had given all the lands back to his uncle;" "that he had parted with all the rights he had to the lands, and to his uncle;" and "that he had re-conveyed all the lands back to his uncle;"—held insufficient, under all the circumstances of the case, to establish the execution and contents of a re-conveyance of the lands..... 648
52. *Secondary evidence of testimony of absent witness.*—A written statement of the testimony given by a witness on the coroner's inquest cannot be received in evidence, although it is shown that the witness has since removed from the State.—*Dupree v. The State*..... 380
53. *Waiver of objection to secondary evidence.*—Under an exception to the master's report, on account of the allowance of an item in the statement of an account, a party cannot avail himself of the objection that secondary evidence was admitted without the proper predicate: an objection should be made to the testimony when offered, and an exception taken to the overruling of the objection.—*Taylor and Wife v. Kilgore*,..... 214

X. PUBLIC DOCUMENTS, RECORDS, AND JUDGMENTS.

54. *Letter from commissioner of general land-office, expressing opinion as to validity of entry.*—A letter from the commissioner of the general land-office, expressing his opinion as to the validity or invalidity of an entry of land, and containing instructions as to what should be done with conflicting entries to the same land, is not competent evidence against a party claiming under one of the entries, to prove that his entry had been canceled in the general land-office.—*Jeans v. Lawler*..... 340
55. *Proof of letters of guardianship.*—The certificate of a probate

EVIDENCE—CONTINUED.

- judge is not competent evidence to prove the grant of letters of guardianship, except as appended to a transcript from the records of his court showing the appointment.—*Peebles v. Tomlinson*..... 336
56. *Admissibility of record as evidence*.—In an action against a purchaser of land at sheriff's sale, brought by one who was neither a party nor a privy to either one of the executions under which the sale was made, the record of a motion against the sheriff, by the plaintiff in one of the executions, to have the proceeds of the sale paid over to him, on the ground that the plaintiff in the other execution was dead before the issue of his execution, is not admissible evidence against the defendant, to prove the fact that said plaintiff in execution was dead before the issue of his execution.—*Wilson v. Campbell*..... 249
57. *Same*.—The record of a judgment is not admissible evidence, as against a prior purchaser from the defendant therein, to show the existence of an indebtedness prior to its rendition. (*RICE, C. J., dissenting.*)—*Troy v. Smith & Shields*..... 469
58. *Same*.—A judgment against the administrator *de bonis non* of a deceased debtor, is no evidence of the debt as against the personal representative of the deceased administrator in chief. *Thomas v. Sterns*..... 137
59. *Authentication of foreign transcript*.—A certificate, appended to a transcript from the records of the court of equity in South Carolina, in these words: "I, J. J., one of the chancellors of the State of said State, and, in turn, presiding chancellor for said district, do hereby certify," &c., appears on its face to be made by the proper person, and conforms to the requisitions of the act of congress.—*Taylor and Wife v. Kilgore*..... 214

EXECUTION.

1. *Validity of execution and levy thereof*.—An agreement between the parties to a pending claim suit, to the effect that a judgment of condemnation should be rendered for the plaintiff in execution, for a sum less than the real value of the slave in controversy, and that the title to the slave should vest in the claimant on payment of this agreed value within a reasonable time, does not render void an execution afterwards issued on a judgment of condemnation; nor does it affect the authority of the sheriff to levy on and sell the slave under the execution, notwithstanding a tender of the agreed value by the claimant.—*Patton v. Hamner*..... 307
2. *Execution on award*.—If an award, made in substantial compliance with the requisitions of the statute, is not performed within ten days after notice of its rendition and delivery of a copy thereof, the papers may be filed in the office of the circuit court, and an execution immediately issued on the award.—*King v. Jemison*..... 499

EXECUTION—CONTINUED.

3. *What title may be sold under execution at law.*—A purchaser of land, holding only his vendor's bond for titles, has not such a title as is subject to levy and sale under execution at law. *Collins v. Doe & Robinson*..... 91
 4. *Same.*—Under the law existing in this State prior to the adoption of the Code, the equitable title of a purchaser of land, who had paid the purchase-money, but had not received a conveyance, could not be sold under execution at law against him. *Fawcetts v. Kimmey*..... 261
- See, also, LIEN.

EXECUTORS AND ADMINISTATORS.

1. *To whom and when letters of administration must be granted.* Under the provisions of the Code, (§§ 1668–69, 1675, 1682,) letters of administration cannot be granted to the largest creditor of the decedent, until the expiration of forty days after the death of the decedent is known, unless all the persons having a prior right to the administration have relinquished their right in the manner prescribed in the statute; nor can letters be properly granted, before the expiration of such forty days, to a person who is neither the widow, (or husband, as the case may be,) next of kin, or largest creditor of the decedent, unless all of them have relinquished their right.—*Curtis v. Williams*..... 570
2. *When application for grant of letters must be made.*—The largest creditor of the estate, desiring the revocation of letters prematurely granted to another, and the grant of letters to himself, must make his application within forty days after the death of the intestate is known, although the persons previously entitled to administer may not then have relinquished their right. (*STONE, J., dissenting*, held, that such creditor could not complain of the dismissal of his application, which was filed before the expiration of the forty days, when he did not show that the persons having a prior right had relinquished it.)..... 570
3. *Right of administration cannot be delegated.*—The widow, or other person entitled to the administration, cannot delegate that right to another, to the exclusion of the person on whom the statute next casts the right..... 570
4. *Revocation of letters improvidently granted.*—If letters of administration have been improvidently granted to a person who was not entitled to them, it is the right and duty of the court, on the application of any person whose right is thereby prejudiced, to revoke them on that ground..... 570
5. *Executor's authority to sell property.*—Where the testator's will directs all his property, both real and personal, to be "valued by three disinterested men, and divided or sold," and the proceeds of sale to be distributed among the legatees, but does not designate the person by whom the sale is to be made, the executor has the power to sell.—*McCollum v. McCollum's Ex'r*..... 711

EXECUTORS AND ADMINISTRATORS—CONTINUED.

6. *Commissions of executor or administrator.*—On partial distribution of a decedent's estate, the executor or administrator is not entitled to commissions on slaves which are distributed unsold. *Jenkins' Ex'r v. Jenkins*..... 731
7. *Allowance of interest to administrator.*—Where an administrator establishes a claim to the allowance of compensation for services rendered to the intestate in his life-time, extending through a series of years, the court may also allow interest on each year's wages.—*Parker's Heirs v. Parker's Adm'rs.*..... 459
8. *Allowances to administrators generally.*—The law does not visit administrators, who fill a fiduciary relation which is indispensable in our judicial system, with severer intendment than are indulged against agents generally; "some of the objections in this case betray a too rigid economy in the matter of allowances."—*Henderson v. Simmons*..... 291
9. *Expenses of propounding supposed will for probate allowed.*—Reasonable costs and expenses, incurred by an executor in propounding for probate a paper which purported to be the last will and testament of the decedent, are a proper charge against the estate, if the executor acted in good faith, and had no reasonable grounds for doubting the validity of the paper; and if the executor resigns the trust, without paying such costs and expenses, and receiving no credit on account thereof, his successor may pay the demand, and charge the estate with the payment; but this item only includes proper expenses incurred in a fair and lawful trial of an issue to test the validity of the paper, and does not embrace money paid in compromise of a contest respecting its validity..... 291
10. *Attorney's fees not allowed as part of costs of contested probate.* Reasonable attorneys' fees, paid by the administrator *de bonis non*, on account of services rendered on the contested probate of the supposed will, are allowable as a part of the costs of probate, if the attorneys were employed by the proponent and executor; *secus*, if it appears that the attorneys were employed by the principal legatee under the supposed will, who afterwards became the administrator *de bonis non*..... 291
11. *Costs of suit on witness-certificates not allowed.*—The costs of suit against an administrator, on witness-certificates issued in an action at law instituted by him or his predecessor, are not a proper charge against the estate, when it appears that he had in his hands, at the time when suit on the certificates was instituted, assets sufficient to pay them..... 291
12. *Expenses of agent allowed as credit.*—Although it is the duty of an administrator to perform all the ordinary services of the administration, if reasonably within his power; yet, for extraordinary services, such as in their nature require appliances or a degree of skill not within the command of ordinary persons, he

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- may employ agents; and the reasonable expenses of such agents are a proper charge against the estate..... 291
13. *Expense of repairing dwelling-house allowed as credit.*—The expense of repairing a dwelling-house belonging to the estate should be allowed as a credit to the administratrix, on proof that the repairs were necessary, the price reasonable, and the account paid by the administrator..... 291
14. *Rent of dwelling-house charged against administratrix.*—An administratrix is chargeable, on final settlement of her accounts, with the reasonable rent of a house and lot belonging to the estate, which, instead of renting out, she herself occupied..... 291
15. *Proof of payment by administrator.*—The creditor's receipt is sufficient to entitle the administrator to a credit for the payment of the demand, although it appears that the matter is left open for adjustment on settlement of their private accounts.... 291
16. *Proof of value of services.*—When an administrator claims to retain for the value of certain services rendered to his intestate during several years before the death of the latter, in superintending the farm, making contracts for him, attending to his negroes, &c., he may prove the yearly value of such services by the opinion of witnesses.—*Parker's Heirs v. Parker's Adm'rs*... 459
17. *Statute of limitations not available to executor or administrator.* An executor or administrator cannot invoke the statute of limitations, to protect himself against the claim of distributees, unless he has denied the continuance of the trust, or set up a claim in his own right.—*Blackwell v. Blackwell*:..... 57
18. *Nor lapse of time, if trust is recognized.*—Ordinarily, the lapse of twenty years from the time when the administrator might be compelled to settle his administration, without the institution of proceedings to compel a settlement, raises the presumption of a settlement and the payment of the distributive interests; but this presumption is repelled by proof that the administrator holds, not in his own right, but in subordination to, and recognition of the rights of the distributees..... 57
19. *Election by distributees to ratify conversion by administrator.*—If an administrator converts the assets of the estate into other specific property, the distributees may, at their election, either charge him with the value of the converted assets, or pursue and claim the specific property obtained in exchange.—*Blackwell v. Blackwell*..... 57
20. *Amendment of account-current.*—The allowance of an amendment of the account-current filed by an administrator is not a matter which will work a reversal of the decree on error, when the record does not show that the distributees were thereby surprised, or that they desired a continuance.—*Parker's Heirs v. Parker's Adm'r* 459

FRAUD.

See CHANCERY,
VENDOR AND PURCHASER.

FRAUDS, STATUTE OF.

1. *Whether promise is original or collateral.*—If an agent of a private corporation contracts a debt on its supposed credit, when the corporation in fact had no authority to contract debts, the contract imposes an original, personal liability on the agent; but, if he gives his note, without any new consideration, for the amount of a debt previously contracted by another person for the corporation, such a note is a collateral contract, and void.—*Drake v. Flewellen & Co.*..... 106
2. *License not within statute of frauds.*—A grant of the privilege of floating spars down a private stream, not involving the holding or occupation of the lands, is a mere license, and not a contract within the statute of frauds.—*Rhodes v. Otis.*..... 578

FRAUDULENT CONVEYANCES.

See DEEDS, 10, 13, 14, 15.

GARNISHMENT.

See ATTACHMENT.

GIFT.

See DEEDS, 2.

GUARDIAN AND WARD.

1. *Appointment of foreign guardian.*—The appointment of a guardian for an infant, on the petition of its mother and sole surviving parent, by the court of equity of a foreign State, in which the domicile of the infant and the greater portion of its property then were, cannot be held invalid or irregular, when collaterally attacked, because its mother was then a married woman, and the infant, who was not of an age to select its own guardian, was not made a party to the proceeding.—*Taylor and Wife v. Kilgore.*..... 214
2. *When statute of limitations begins to run between guardian and ward.*—A right of action does not accrue to a guardian against his ward, for reimbursement of the costs and expenses attendant on the unsuccessful prosecution of a suit, until the termination of the guardianship; and the ward's removal to another State, does not affect the principle..... 214
3. *When guardian is entitled to reimbursement for expenses of unsuccessful litigation.*—A guardian who, in the institution of a suit in the name and for the benefit of his ward, acts in good faith and on reasonable grounds, is entitled to reimbursement of the costs and expenses, notwithstanding his failure in the suit.... 214
4. *Allowance of solicitor's fees.*—A fee of \$500, paid by the guar-

GUARDIAN AND WARD—CONTINUED.

- dian to the solicitor by whom the suit in equity was conducted, held a proper item for reimbursement, on proof that the fee was reasonable, and that the solicitor was a man of good professional reputation; the other circumstances in the case being deemed sufficient to show that, by the contract of employment, his fee was not made dependent on the success of the suit..... 214
5. *Costs of amendment allowed*.—Where it appears that the guardian had employed competent counsel, he is entitled to reimbursement of the costs imposed on him, as the terms on which an amendment of his bill was allowed..... 214
6. *Costs of procuring attendance of witnesses*.—The amount paid by the guardian, in procuring the personal attendance of a female witness, who resided more than one hundred miles from the place where the suit was pending, is not a proper item for reimbursement, in the absence of proof that the law authorized that method of procuring testimony, or that peculiar circumstances required it..... 214

HUSBAND AND WIFE.

1. *Husband's marital rights*.—Money paid to the husband, during the wife's lifetime, by the executors of her deceased father, on account of her interest as a legatee in the debts due to the estate, becomes the absolute property of the husband, unless the bequest created a separate estate in the wife; but the husband's marital rights do not attach to money collected by the executors after the death of the wife, although paid over to him by the executors.—*Johnson's Adm'r v. Johnson*..... 284
2. *Husband not entitled to reimbursement out of wife's separate estate for debts paid for family supplies*.—If the husband, after the death of the wife, pays debts contracted for family supplies during coverture, which constitute a charge on the wife's separate estate under the act of 1850 and under the Code, he cannot come into equity to be reimbursed out of the *corpus* of such estate, or to be subrogated to the rights which the creditors might have had against it.—*Rogers v. Boyd*..... 175
3. *Nor to have separate estate subjected to payment of outstanding debts*.—Whatever may be the rights of creditors to subject the wife's separate estate, after her death, to the payment of debts contracted during the coverture for family supplies, the surviving husband has no equity to maintain a bill for the purpose of having the *corpus* of her estate subjected to the payment of such debts..... 175
4. *Liability of separate estate for debts contracted during coverture in farming*.—The *corpus* of the wife's separate estate cannot be charged during coverture, for debts contracted, with her consent, in carrying on farming operations with her slaves; nor can it be subjected by the husband, after her death, to the payment of such debts..... 175

HUSBAND AND WIFE—CONTINUED.

5. *Liability of separate estate for necessities furnished to wife and family.*—A married woman, owning a separate estate created by deed, may charge it, by contract express or implied, with the payment of necessary medical services rendered to her and the family; but, where it appears that the physician was called in by the husband, and it is not shown that the wife authorized or assented to his employment on the credit of her separate estate, the debt imposes a legal liability on the husband alone, although he was insolvent at the time; and the fact that the wife, during her last illness, requested her husband and children to pay the debt, is not sufficient to charge her separate estate with its payment.—*Gunn v. Samuel's Adm'r*..... 201
6. *Conveyance of wife's separate estate.*—A bill of sale for a slave belonging to the wife's separate estate, executed by husband and wife, attested by only one witness, and not shown to be under seal, is not sufficient, under the provisions either of the Code or of the act of 1850, to pass the title of the wife when a minor.—*Whitman v. Abernathy*,..... 154
7. *Rents and profits of wife's separate estate.*—When a married woman files a bill for the recovery of property belonging to her separate estate under the act of 1850, which has been sold by her husband without authority, and for the removal of her husband as her trustee, she is not entitled to a decree for the hire accruing before the order for the husband's removal as trustee. 154
8. *Purchaser's liability for loss of property.*—Under such a bill, the purchaser from the husband, or a sub-purchaser, is liable to the wife for the value of a slave who died in his possession pending the suit. 154
9. *Respective interests of husband and wife in proceeds of sale of wife's land.*—Where lands, descended to the wife in 1847 during coverture, were sold and conveyed by her and her husband jointly in 1854; and a note taken for part of the purchase-money, payable to the husband, did not mature until after his death,—*held*, that the sale operated a conversion of the realty into personalty, but did not divest the wife's interest in the proceeds of sale; and that the entire interest in the note given for the purchase-money, except the annual interest which had accrued at the death of the husband, became the wife's separate estate under the Code. *Sessions' Adm'r v. Sessions*..... 522
10. *When action lies against wife.*—An action at law does not lie against a married woman, jointly with her husband, on an open account contracted during coverture.—*Childress and Wife v. Mann & Co*..... 206
11. *When action lies against husband by wife's administrator.*—An action for money had and received lies against the husband, in favor of the personal representative of his deceased wife, to recover money paid over to him by the executors of the wife's

HUSBAND AND WIFE—CONTINUED.

- father under a legacy to her, to which his marital rights never attached.—*Johnson's Adm'r v. Johnson*..... 284
12. *When judgment against husband and wife is proper*.—In a chancery suit against husband and wife, by the wife's late guardian, for reimbursement of the costs and expenses of litigation on her account, if it appears that the husband received property by his wife, exceeding the amount of the plaintiff's demand, the "woman's law" of 1846 (Session Acts of 1845-46, p. 25, § 6) authorizes the rendition of a joint decree against him and his wife.—*Taylor and Wife v. Kilgore*..... 214
13. *When wife may come into equity*.—A married woman, having a separate estate created by law, may come into equity to have her husband removed from the trusteeship of her estate, and to recover property which he has disposed of without authority. *Whitman v. Abernathy*,..... 154
14. *When widow may come into equity against husband's administrator*.—A widow cannot maintain a bill in equity against the administrator of her deceased husband, to recover money collected by the administrator on a note given for the purchase-money of the wife's land, when it appears that the entire interest in the note, except the annual interest which had accrued up to the death of her husband, belonged to the wife's separate estate under the Code: her remedy at law, in such case, is clear, adequate, complete, and exclusive.—*Sessions' Adm'r v. Sessions*, . 532
15. *Election by wife*.—A married woman, not owning a separate estate by statute, cannot, although living separate and apart from her husband, make an election for herself in the matter of an equitable conversion.—*High v. Worley*..... 196
16. *Appeal bond by wife*.—Where a married woman takes an appeal, from a judgment in an action at law against her and her husband, she may execute an appeal bond in her own name, without joining her husband.—*Childress and Wife v. Taylor*..... 185
17. *Service of summons*.—In an action against husband and wife, if the sheriff's return shows that the summons was not executed on the wife, and there was no appearance by her, the judgment against both will be reversed on error..... 185

INDIAN RESERVATIONS.

1. *Under treaty of 1832 with the Creek Indians*.—Under the treaty of 1832, between the United States and the Creek Indians, the title to all the Creek lands was ceded to the United States, and the reservations to the heads of families were of an estate for five years only, to be enlarged into a fee, at the expiration of that time, on the happening of the contingencies provided for in the treaty. (Overruling *dicta*, to the effect that the reservee took a defeasible fee, in *Wells v. Thompson*, 13 Ala. 793; *Corprew v. Arthur*, 15 Ala. 525; and *Rowland & Heifner v. Ladiga*, 21 Ala. 9.)—*Rose v. Griffin*..... 717

INSOLVENT ESTATES.

1. *When objections to claims must be made.*—An objection to a claim against an insolvent estate, denying its justice, and setting up the statute of limitations, but not controverting the fact of its being filed in due time, must be made within twelve months after the declaration of insolvency, (Code, §§ 1853-4;) and the time cannot be enlarged by an agreement between the probate judge and the administrator of the estate.—Hardy v. Meachem's Adm'r..... 457

INSURANCE.

1. *Waiver of preliminary proof of loss.*—If the insurers, in case of a loss covered by the policy, intend to contest their liability on account of defects in the preliminary proof, it is their duty to put their refusal to pay on that ground, or to inform the assured that they consider such proof defective; and if they fail to do so, their silence is an implied waiver of such defects. (STONE, J., dissenting, held that, under the proof in this case, the court was not authorized to assume, as matter of law, that the answer of the insurers was a refusal to pay in any event.) Firemen's Ins. Co. v. Crandall..... 9

JUDGMENTS AND DECREES.

1. *Conclusiveness of judgment.*—A judgment against the administrator *de bonis non* of a deceased debtor, is no evidence of the debt as against the personal representative of the deceased administrator in chief.—Thomas v. Sterns..... 137
2. *Validity of decree of orphans' court.*—A decree of the orphans' court, under the act of 1845, (Session Acts 1844-5, p. 167,) directing the "administrator of J. T., who was the administrator of W. T.," to pay to the respective distributees of W. T.'s estate the amount found due to them, is not void for uncertainty, but is amendable by other parts of the record, where the name of the administrator is stated, and will be considered amended accordingly..... 137
3. *When judgment against husband and wife is proper.*—In a chancery suit against husband and wife, by the wife's late guardian, for reimbursement of the costs and expenses of litigation on her account, if it appears that the husband received property by his wife, exceeding the amount of the plaintiff's demand, the "woman's law" of 1846 (Session Acts 1845-46, p. 25, § 6) authorizes the rendition of a joint decree against him and his wife. Taylor and Wife v. Kilgore..... 214
4. *Construction and effect of conditional order of dismissal.*—An order of court directing the plaintiff's suit to stand dismissed, if he failed to answer interrogatories propounded to him within one hundred and twenty days, is not final in its character, but may be modified or vacated at a subsequent term; nor does it become effectual, until the default has been judicially ascertained at the next ensuing term.—Ex parte McLendon..... 276

JUDGMENTS AND DEGREES—CONTINUED.

5. *Conclusiveness and effect of decree of appellate court in chancery cause.*—A decree of the supreme court of a foreign State, rendered on appeal from a decree of the chancellor, must be regarded by our courts, in the absence of proof to the contrary, as the only decree which has any force in the cause in which it was rendered; nor can the record and pleadings be looked to, in such case, for the purpose of showing and correcting a mistake in the decree of the appellate court.—*Hassell v. Hamilton*, 280
6. *Judgment not merged in forfeited claim bond.*—The forfeiture of a claim bond does not operate as a merger or satisfaction of the original judgment, nor does it deprive the plaintiff of the right to sue out an *alias* or *pluries* execution.—*Patton v. Hamner*.... 307
7. *Execution of writ of inquiry.*—In an action on an open account, the court is not authorized, on overruling a demurrer to the plaintiff's evidence, (Code, § 2352,) to render judgment final for the plaintiff without having the damages ascertained by a jury. *Patterson v. Blakeney*..... 338
8. *Same.*—In an action on an inland bill of exchange, duly protested for non-payment, by endorsee against payee as endorser, the statute (Code, § 2366) authorizes the rendition of a final judgment by default, without the intervention of a jury, for the amount of the bill, with interest and damages.—*McKenzie v. Clanton*..... 528
9. *When action lies on judgment.*—In this State, an action lies on a judgment after the expiration of one year from its rendition, although an execution may also be sued out upon it.—*Elliott v. Holbrook, Carter & Co*..... 659
10. *Admissibility as evidence.*—The record of a judgment is not admissible evidence, as against a prior purchaser from the defendant therein, to show the existence of an indebtedness prior to its rendition. (*RICE, C. J., dissenting.*)—*Troy v. Smith & Shields*.. 469
11. *Estoppel by judgment.*—When the recitals of a judgment against a partnership, confessed by one of the partners, show that he had special authority to do so, the other partners are estopped, in an action on the judgment, from denying the truth of the recital.—*Elliott v. Holbrook, Carter & Co*..... 659

JURISDICTION.

1. *Jurisdiction not conferred by consent.*—Where the court has no jurisdiction of the subject-matter and case, no waiver or consent of the parties can confer jurisdiction.—*Little v. Fitts*..... 343
2. *Appellate jurisdiction of circuit court.*—The circuit court has no jurisdiction of a case brought up by appeal from a justice's court, on a trial of the right of property in a slave, under an execution issued by a justice in a different county, and levied by a constable, when it does not appear that any judgment was ever rendered in the case by the justice, and the appeal purports to have been taken from the judgment of the jury..... 343

LANDLORD AND TENANT.

1. *Lessee's liability on implied renewal of lease.*—Where two co-administrators rent out their intestate's lands for the term of one year, and the lessee holds over after the expiration of his term; but the lands are sold, under an order of court, before the expiration of the year, and purchased by one of the administrators individually, he cannot hold the lessee liable, as on an implied renewal of the lease, when he has never been in actual possession, and did not obtain a deed until after the lessee had left the premises.—*Couch v. McKellar*..... 473

LEGACY AND DEVISE.

1. *Legacy held specific, and not demonstrative.*—A legacy of twenty negroes, "of the average value of all the negroes owned by" the testator, to his wife for life, with remainder over, followed by a bequest of "all the rest and residue of the negro slaves belonging" to him to his children, is neither a general, nor a demonstrative, but a specific legacy—*Myers' Executors v. Myers*..... 85
2. *Hire of slaves specifically bequeathed.*—If slaves, specifically bequeathed, are detained by the executor after they are due to the legatee, and profit thereby accrues to the estate by their labor or hiring, the legatee may recover their reasonable hire from the executor..... 85

LIENS.

1. *Conflicting liens of mortgage and judgment.*—The lien of a judgment on land is superior to that of a mortgage executed by the debtor after the rendition of the judgment; and a purchaser at sheriff's sale under the judgment consequently acquires a title superior to that of any one holding under the mortgage.—*Fawcetts v. Kimmey*..... 261
2. *Same.*—The lien of a mortgage, duly recorded, is superior to that of a purchaser at sheriff's sale against the mortgagor, under an execution issued after the registration of the mortgage.—*Troy v. Smith & Shields*..... 469
3. *Conflicting liens of equitable mortgage and attachments.*—The lien of an equitable mortgage on a steamboat, created by contract in a foreign state, is superior to that of an attachment or libel levied on the boat here, at the suit of creditors who are not entitled to protection as innocent purchasers for valuable consideration without notice.—*Donald & Co. v. Hewitt*..... 534
4. *Conflict between foreign and domestic liens on steamboats.*—A lien on a steamboat, created by a foreign statute, for work, materials, &c., cannot operate to defeat a lien acquired by attachment or libel in this State, where the boat had been brought, before the foreign lien was set up..... 534
5. *Meaning of term lien.*—Whatever may have been the import of the word *lien* at common law, as applicable to cases in which a

LIENS—CONTINUED.

- party had a right to retain the possession of property until a demand was satisfied, it has acquired in our law a more extended signification, and may include an equitable mortgage, where there is no right to retain possession of the thing itself..... 534
6. *Difference between statutory and contract liens.*—A contract between a workman and a part owner of a steamboat, providing that the former, having constructed and erected an engine on the boat, “shall retain a special lien on said boat and engines until the notes (given for the price) are paid,” creates a lien independent of statutory provisions conferring liens on workmen and material-men..... 534
7. *What debts are included in contract lien.*—A lien on a boat for a specific amount, created by contract between the owners and a workman, cannot be held to include a debt incurred for additional work outside of the contract, when it is not alleged that such additional work was done on the faith of the lien, or that there was an agreement between the parties that the lien should be enlarged to include the price of such work..... 534
8. *Endorsement on enrollment of steamboat construed to create lien.* An endorsement on the enrollment of a steamboat by the inspector of customs, made by the directions of the owner, declaring that “S. & H. hold a lien on said boat to secure the payment of six drafts,” (given for work done on the boat,) “and this endorsement to be continued on all enrollments issued for the boat, until all the above drafts are fully paid, and S. & H. fully satisfied;” by which memorandum, it was averred, the owner “acknowledged, admitted, declared and gave a lien” for the entire indebtedness secured by the drafts, part of which was already secured by a special lien on the boat created by prior contract,—is the declaration of a valid trust, which a court of equity will sustain and enforce. (WALKER, J., *dissenting*, held, that the endorsement was not designed to evidence the declaration of any new trust, but was simply intended to give notice of a pre-existing statutory lien.)..... 534
9. *Writing held insufficient to create contract lien.*—A written instrument, signed by the master and principal owner of a steamboat, and filed with the boat papers in the office of the inspector and collector of customs; acknowledging an indebtedness on account of certain drafts which were given for work and materials for the boat, and adding, “the mortgage or lien to continue on the boat papers, as security for these drafts, until finally paid and released,”—does not create or evidence a contract lien on the boat, but is merely intended to give notice of the existence of a statutory lien..... 534
10. *Equitable lien.*—If an administrator grants indulgence to one of the distributees, on a note given for the purchase-money of slaves bought at a sale of the property of the estate, until the statute of limitations has barred a recovery on the note, this

LIENS—CONTINUED.

gives him no right to come into equity, to establish a lien on the slaves for the unpaid purchase-money.—*Moore v. Lesueur and Wife*..... 237

LIMITATIONS, STATUTE OF

1. *Sufficiency of subsequent promise to remove statutory bar*.—A declaration by the debtor, to the attorney of the administrator of the deceased creditor, 'that he had once offered to *settle the claim in lands*, and either would or could now *settle the claim in lands* if the administrator was authorized to make any settlement of it,' held insufficient, on demurrer, to remove the bar of the statute of limitations. (Overruling *Newhouse v. Redwood*, 7 Ala. 598.)—*Bates' Adm'r v. Bates*..... 102
2. *Limitation of real action*.—There is no statute of limitations of force in this State, applicable to an action of ejectment commenced within one year after the adoption of the Code, (January 17, 1853,) unless a bar was perfected under the statute which existed before the passage of the act of 1843.—*Collins v. Robinson*, 91
3. *Limitation of action on note*.—The statute of limitations of six years is a good plea to a complaint which avers the making of a promissory note by the defendant, its endorsement by the payee, the recovery of a judgment thereon by the endorsee against the maker, the issue of an execution thereon and its return "no property found," the subsequent recovery of a judgment against the endorser, its satisfaction by him, and the transfer by him to plaintiff "of said claim against defendant."—*Smith v. Harrison*..... 706
4. *Limitation of appeal*.—The act of February 15, 1854, (Session Acts 1853-54, p. 71,) "to modify the operation of the statute of limitations," in its application to "causes of action" accruing prior to the 17th January, 1853, embraces appeals. (Overruling *Green v. Maclin*, 29 Ala. 695.)—*Lewis' Adm'r v. Lindsay's Adm'r*..... 304
5. *Limitation of prosecution for misdemeanor*.—When a prosecution for a misdemeanor is commenced by indictment, the indictment must be found (Code, § 3374) within twelve months after the commission of the offense; but, when the defendant is bound over to answer an indictment to be preferred against him, the commencement of the prosecution dates from that time, and not from the time when the indictment is found. *Molett v. The State*..... 408
6. *Limitation of suit for redemption*.—By analogy to the statute of limitations applicable to actions at law for the recovery of personal property, equity will not entertain a bill for the redemption of mortgaged slaves after the expiration of six years from the law-day of the deed, when the mortgagee and his representatives have had continuous possession of the property from the time of the forfeiture, without any acknowledgment, ex-

LIMITATIONS, STATUTE OF—CONTINUED.

- press or implied, of the mortgagor's right; and the fact that the mortgage contained a provision, authorizing the mortgagee to retain the possession of the property until the mortgage debt was paid, does not exempt it from the operation of this principle.—*Byrd v. McDaniel*..... 18
7. *When statute begins to run between guardian and ward*.—A right of action does not accrue to a guardian against his ward, for reimbursement of the costs and expenses attendant on the unsuccessful prosecution of a suit, until the termination of the guardianship; and the ward's removal to another State, does not affect the principle.—*Taylor and Wife v. Kilgore*..... 214
8. *Statute not available to executor or administrator*.—An executor or administrator cannot invoke the statute of limitations, to protect himself against the claim of distributees, unless he has denied the continuance of the trust, or set up a claim in his own right.—*Blackwell v. Blackwell*..... 57
9. *Nor lapse of time, if trust is recognized*.—Ordinarily, the lapse of twenty years from the time when the administrator might be compelled to settle his administration, without the institution of proceedings to compel a settlement, raises the presumption of a settlement and the payment of the distributive interests; but this presumption is repelled by proof that the administrator holds, not in his own right, but in subordination to, and recognition of the rights of the distributees..... 57
- See, also, ADVERSE POSSESSION.

MARRIAGE LICENSES.

1. *Construction of statute requiring consent of parent or guardian to marriage of minor*.—Under section 1950 of the Code, requiring the consent of parents or guardians to the marriage of minors, it is not necessary that both parties to the intended marriage should be within the specified ages: if the male is under twenty-one years of age, and has not had a former wife; or if the female is under eighteen years of age, and has not had a former husband,—in either case, the consent of the parent or guardian of such minor is necessary.—*Cotten v. Rutledge*..... 110
2. *What constitutes defense to action for statutory penalty*.—In issuing a marriage license, a judge of probate acts ministerially, not judicially; and if he issues a license to a minor, without the consent of the parent or guardian, as required by section 1950 of the Code, the fact that he honestly believed that the infant was of lawful age, or that the infant made affidavit before him that such was the fact, is no defense to an action to recover the penalty prescribed by section 1953..... 110
3. *Verdict and judgment*.—In such action, if the plaintiff recovers at all, his recovery must be for the amount of the statutory penalty; and a verdict "for the plaintiff," not specifying any

MARRIAGE LICENSES—CONTINUED.

amount, is sufficient to authorize a judgment in his favor for the statutory penalty, with the costs of suit..... 110

MORTGAGES,

1. *Equitable mortgage*.—A contract, under seal, between a workman and one of the part owners of a steanboat, by which the former agreed to make and put up an engine on the boat, and the latter agreed to pay him a stipulated sum in cash, and to give three notes or acceptances for another sum, payable four, six and eight months after date; and by which it was stipulated, that, for the better security of the payment of the said notes, the workman should retain a special lien on said boat and engine until the notes were paid,—creates an equitable mortgage in favor of the workman, which is not dependent for validity on his retention of the possession of the boat.—Donald & Co. v. Hewitt,..... 534
2. *Fraudulent deed not reformed*.—A court of equity will not, at the instance of the grantor, declare a deed, absolute on its face, to be a mortgage or trust, when the evidence shows that the transaction was intended by the parties to delay, hinder or defraud the grantor's creditors.—May v. May's Adm'r.,..... 203
3. *When mortgagee may maintain ejectment*.—Authorities cited by the court on the question, whether a mortgagee may maintain ejectment after payment of the mortgage debt.—Collins v. Doe d. Robinson..... 91
4. *Release of mortgage by subsequent parol contract*.—A mortgage of personal property, so far as it conveys the title to the property to the mortgagee, may be released or discharged by a subsequent verbal contract: either an agreement by the mortgagor to do certain things, or the performance of those things by him, may be made the ground of settlement or discharge.—Acker v. Bender..... 230
5. *Limitation of suit for redemption*.—By analogy to the statute of limitations applicable to actions at law for the recovery of personal property, equity will not entertain a bill for the redemption of mortgaged slaves after the expiration of six years from the law-day of the deed, when the mortgagee and his representatives have had continuous possession of the property from the time of the forfeiture, without any acknowledgment, express or implied, of the mortgagor's right; and the fact that the mortgage contained a provision, authorizing the mortgagee to retain the possession of the property until the mortgage debt was paid, does not exempt it from the operation of this principle. Byrd v. McDaniel..... 18
6. *Validity of mortgage impeached for fraud*.—A mortgage, founded on valuable and adequate consideration, will not be declared void for fraud, when assailed by a subsequent purchaser at execution sale against the mortgagor, on proof of the

MORTGAGES—CONTINUED,

- mortgagor's embarrassed condition and relationship to the mortgagee.—*Troy v. Smith & Shields*,..... 469
7. *Validity of mortgage not affected by changing form of security, or blending new debt*.—The validity of an equitable mortgage, created by contract, is not affected by the fact that the notes actually given did not correspond with those contemplated when the contract was made, or that they were made to include an additional indebtedness not provided for by the contract. *Donald & Co. v. Hewitt*,..... 534
- See, also, **LIENS**, 1-4.

NON-CLAIM.

See **ESTATES OF DECEDENTS**, 1.

NON-SUIT.

See **ERROR AND APPEAL**, 4.

OVERRULED CASES.

1. *Bob v. The State*, 29 Ala. 20, overruled as to principle asserted in third head-note, by *Henry v. The State*,..... 389
2. *Corprew v. Arthur*, 15 Ala. 525, overruled as to *dicta* respecting estate of Creek Indian reservee, by *Rose v. Griffin*,..... 717
3. *Green v. Maclin*, 29 Ala. 695, respecting limitation of appeal, overruled by *Lewis' Adm'r v. Lindsay's Adm'r*,..... 304
4. *Newhouse v. Redwood*, 7 Ala. 598, respecting sufficiency of subsequent promise to remove bar of statute of limitations, overruled by *Bates' Adm'r v. Bates*,..... 102
5. *Rowland & Heifner v. Ladiga*, 21 Ala. 9, *dicta* respecting estate of Creek Indian reservee, overruled by *Rose v. Griffin*,..... 717
6. *Wells v. Thompson*, 13 Ala. 793, *dicta* respecting estate of Creek Indian reservee, overruled by *Rose v. Griffin*,..... 717

PARTNERSHIP.

1. *Authority of partner and part owner*.—One partner has authority to incur the entire interest in the personal property belonging to the partnership, for the security of its debts; but the mere fact that two persons jointly own a steamboat, does not constitute them partners in the boat, nor does it confer any power on one, in the absence of a special authority from the other, to bind the entire interest in the boat by a contract for work or materials.—*Donald & Co. v. Hewitt*,..... 534
2. *Validity of confessed judgment against partnership*.—A partner cannot, without special authority, confess a judgment against the partnership; yet, where the confessed judgment recites, that the defendants, "merchants and partners under the firm name of H., E. & E., came into open court by said H., one of said firm," and confessed the judgment, this is sufficient, when the judgment is collaterally assailed, to show that said H. had a special authority.—*Elliott v. Holbrook, Carter & Co.*,..... 659

PARTNERSHIP—CONTINUED.

3. *Release of partner.*—A release of one partner from a partnership liability is, *prima facie*, a release of all the partners..... 659
4. *Liability as partner on note executed in partnership name.*—In an action against several persons, as partners, on a promissory note executed by the partnership, if one of the defendants pleads *non est factum*, it is incumbent on the plaintiff to prove that such defendant himself executed the note, or that he was a member of the firm when it was executed, or that he had been a member of the firm, and that the plaintiff, having had previous dealings with it, had not been notified of his withdrawal at the time when the note was given.—*Rabby & Co. v. O'Grady*, 255
5. *Admissibility of partnership accounts against third persons as affecting liability of person as partner.*—In an action against several persons, as partners, on a promissory note executed in the name of the partnership, accounts contracted by third persons with the partnership, under its different firm names, are not, *prima facie*, competent evidence against one of the defendants, who pleads *non est factum* and the general issue.—*Rabby & Co. v. O'Grady*..... 255

PLEADING AND PRACTICE.

I. PARTIES.

1. *Who is proper party plaintiff.*—Section 2129 of the Code does not apply to a written contract, by which defendant acknowledged his receipt of his own note, payable to a third person or order, and promised to return or account for it to the person from whom he received it; but such receipt 'having been endorsed in blank by the promisee to the payee of the note, and afterwards transferred by delivery by the latter to plaintiff, the legal title vests in the plaintiff by virtue of section 1530 of the Code, and he may maintain an action on the contract in his own name.—*Henley v. Bush*..... 636
2. *Same.*—A judgment is not a "contract, express or implied, for the payment of money," within the meaning of section 2129 of the Code.—*Smith v. Harrison*..... 706
3. *Same.*—When a bond is valid only as a common-law obligation, and is not governed by the statutory provisions respecting remedies on official bonds, a suit can only be maintained upon it in the name of the obligee; while, under the provisions of the Code, (§§ 2154, 131,) any person aggrieved may sue in his own name for the breach of an official bond; and bonds under which public officers have acted, and which are within the provisions of section 132, though not strictly official bonds, are subject to the same remedies as official bonds.—*Sprowl v. Lawrence*.... 674
4. *Husband and wife.*—The wife cannot be joined with her husband in an action at law on an open account contracted during coverture.—*Childress v. Mann & Co.*..... 206

PLEADING AND PRACTICE—CONTINUED.

II. DECLARATION, OR COMPLAINT.

5. *Sufficiency of complaint in averment of facts instead of legal conclusion.*—In declaring against a municipal corporation, for damages caused by its neglect of duty in repairing streets and constructing sewers, an allegation that the defendant “wrongfully” refused to repair the streets, and “wrongfully” suffered large quantities of water to accumulate, &c., is the averment of a legal conclusion, and, consequently, is insufficient.—*City Council of Montgomery v. Taylor & Gilmer*..... 116
6. *In action against husband and wife.*—In an action against husband and wife, for articles of family supply furnished during coverture, if the complaint does not aver that the wife has a separate estate by law, (Code, § 1987,) it shows no cause of action as against her.—*Childress v. Mann & Co*..... 206
7. *In action against administrator.*—In an action against an administrator, on a contract made by his intestate in his life-time, a count which does not show that the defendant is administrator is demurrable.—*McNeill’s Adm’r v. Cook & Johnson*..... 278
8. *In action on lost bank-note.*—It is not necessary, in the description of the lost notes on which the suit is founded, to aver their dates, or the time when they were payable: the courts will take judicial notice of the fact, that they were payable on demand.—*Bank of Mobile v. Meagher & Co*..... 622
9. *In action on bond.*—The form of complaint prescribed by the Code, (p. 553,) in actions “on bonds with conditions,” applies only to bonds which are valid on their face; but in an action on the bond of a public officer, in the name of the party injured by the breach, if the complaint shows that the bond was not executed and filed until after the expiration of the time prescribed by law, it must also aver that the bond was delivered, and that the officer acted under it.—*Sprowl v. Lawrence*..... 674
10. *In action on note.*—In an action by the assignee against the maker of a note, an averment in the complaint, “that said sum of money mentioned in said note, with interest thereon, is now due to plaintiff,” is a sufficient allegation of the plaintiff’s ownership.—*Nesbitt v. Pearson’s Adm’rs*..... 668
11. *Same.*—A complaint which avers the making of a promissory note by the defendant, its endorsement by the payee, the recovery of a judgment thereon by the endorsee against the maker, the issue of an execution thereon and its return “no property found,” the subsequent recovery of a judgment against the endorser, its satisfaction by him, and the transfer by him to plaintiff “of said claim against defendant,” is a good and sufficient complaint on the note.—*Smith v. Harrison*..... 706
12. *Duplicity.*—A complaint in trespass on the case, which unites in the same count a cause of action growing out of the defendant’s obstruction of the navigation of a public stream with his breach of duty under a contract with plaintiff respecting the naviga-

PLEADING AND PRACTICE—CONTINUED.

tion of the stream, is objectionable for duplicity.—Rhodes v. Otis..... 578

III. PLEA.

13. *Plea of former recovery*.—In detinue, a plea of former recovery in a statutory claim suit, averring that plaintiff has not acquired any title since the rendition of that judgment and verdict, is a bar to the action.—Patton v. Hamner..... 307
14. *Plea denying endorsement*.—In an action by the endorsee or transferee, against the maker of a promissory note, the endorsement or transfer can only be denied by a sworn plea.—Smith v. Harrison..... 706
Also, Nesbitt v. Pearson's Adm'rs..... 668
15. *Plea of statute of limitations*.—The statute of limitations of six years is a good plea to a complaint which avers the making of a promissory note by the defendant, its endorsement by the payee, the recovery of a judgment thereon by the endorsee against the maker, the issue of an execution thereon, and its return "no property found," the subsequent recovery of a judgment against the endorser, its satisfaction by him, and the transfer by him to plaintiff "of said claim against defendant." Smith v. Harrison..... 706
16. *Special plea of non est factum by agent*.—When an agent is sued on a promissory note which, *prima facie*, imposes a personal obligation on him, and seeks to defend himself on the ground that the note was in fact the contract of his principal, he must make his defense under a sworn plea; and, if the principal is a private corporation, must show that it had authority to bind itself.—Drake v. Flewellen & Co..... 106
17. *Form and sufficiency of plea of former acquittal or conviction*.—In a plea averring a former conviction or acquittal, the former indictment must be set out in full, and the conviction or acquittal under it; and there must be an averment of the identity of the prisoner, and of the offense charged in the two indictments. Henry v. The State..... 389

IV. DEMURRER.

18. *Specifications of grounds of demurrer*.—On demurrer to a complaint, (Code, § 2253,) the court cannot consider any other objection than that specifically stated in the demurrer.—Cotten v. Rutledge..... 110
19. *Effect of demurrer to plea*.—Under section 2253 of the Code, which requires a specification of the grounds of demurrer, a demurrer to a plea cannot be visited upon the complaint. Henley v. Bush..... 636
20. *Effect of demurrer to replication*.—Under the Code, (§ 2253,) a demurrer to a replication cannot be visited upon the plea.—Elliot v. Holbrook, Carter & Co..... 659

PLEADING AND PRACTICE—CONTINUED.

V. OTHER MATTERS.

21. *Waiver of argument to jury.*—When the counsel of both parties have waived their right to argue the cause to the jury, by declining to argue it before them after the evidence on both sides is closed, the fact that the court afterwards allows one party to read to the jury, on their return for further instructions, a record which had been previously read to them, does not revive the right of the other to argue the cause to the jury.—*Cotten v. Rutledge*..... 110
22. *Service of summons.*—In an action against the husband and wife, if the sheriff's return shows that the summons was not executed on the wife, and there was no appearance by her, the judgment against both will be reversed on error.—*Childress and Wife v. Taylor*..... 185

PRESUMPTIONS.

1. *Presumed continuance of insanity once established.*—Insanity being once established, its continuance is presumed until the contrary is proved.—*Wray v. Wray*..... 187
 2. *Presumed settlement of administration.*—Ordinarily, the lapse of twenty years from the time when the administrator might be compelled to settle his administration, without the institution of proceedings to compel a settlement, raises the presumption of a settlement and the payment of the distributive interests; but this presumption is repelled by proof that the administrator holds, not in his own right, but in subordination to, and recognition of the rights of the distributees.—*Blackwell v. Blackwell*..... 57
 3. *Presumed regularity of judicial sale.*—In an action brought by an administrator *de bonis non*, against one claiming under a purchase at a public sale by the administrator in chief, the regularity of the sale, and the order under which it was made, may be presumed from the lapse of twenty years, accompanied with proof of adverse possession under the sale for that length of time, and of the fact that the records of the court were loosely kept about the time when the order of sale was made.—*Wyatt's Adm'r v. Scott*..... 313
- See, also, ERROR AND APPEAL, 13–16.

PROHIBITION,

1. *When prohibition lies to circuit judge.*—The supreme court will not award a prohibition, to restrain proceedings under a rule *nisi* for a *mandamus*, issued by a circuit judge to the probate court, because the statute (Code, § 629) authorizes circuit judges to grant writs of *mandamus*; but the writ will be awarded to vacate and annul an order for a *supersedeas*, granted by such circuit judge, to restrain proceedings under an execution issued on a decree of the probate court until such application for a *mandamus* could be heard in the circuit court.—*Ex parte Peterson*. 74

REHEARING.

1. *Facts insufficient to authorize rehearing.*—After final judgment on verdict, the defendant cannot obtain a rehearing, (Code, § 2408,) by showing that his witnesses were absent at the trial term; that he was ruled to a strict showing for a continuance, contrary to the usual practice of the court, and was unable to state fully the facts which his witnesses would prove; and that the jury, being anxious to return to their homes on Saturday evening, decided the case without due deliberation.—*Elliott v. Cook*..... 490
2. *Same.*—After final judgment on verdict against the plaintiff, in an action brought by him to recover the price of a negro sold to defendant, he cannot obtain a rehearing under the statute, (Code, § 2408,) by showing that his bill of sale for the slave, which was read in evidence on the trial by the defendant, by mistake contained a warranty both of soundness and title, instead of a warranty of title only; that he was not apprised of the mistake until after the trial, and was not personally present at the trial, which was had at a place seventy miles distant from his residence; that the case had been previously referred to arbitrators, but the submission was rescinded on account of the defendant's failure to comply with its stipulations; and that the case was afterwards tried before the plaintiff had any knowledge of its condition.—*Stewart v. Williams*..... 492
3. *Security for costs.*—An application for a rehearing after final judgment at law, (Code, § 2408,) by a non-resident defendant, is within the statute (Code, § 2396) requiring security for costs, in "actions commenced by or for the use of a non-resident;" and the giving of a *supersedeas* bond does not dispense with the necessity for such security.—*Garrett & Bibb v. Terry*..... 514

ROADS.

1. *Mode of warning hands.*—When an overseer of slaves is warned to work on a public road, (Code, § 1166,) the failure to send the slaves under his charge is his default, and not that of his employer; nor is the employer rendered liable to the statutory penalty, (Code, § 1169,) by the fact that, when informed by the overseer of such warning, he directed the latter not to send the slaves to work on the road.—*James v. Clarke County*..... 51

SHERIFFS.

1. *Sheriff's power and duty in executing conveyance to purchaser.* The power of a sheriff to sell land under execution, to receive the purchase-money, and to execute a conveyance to the purchaser, is not a mere naked power, but a power coupled with a trust, which it is his duty to execute; and this trust does not become extinct by his death before the execution of a convey-

SHERIFFS—CONTINUED.

- ance to the purchaser, after he has received the purchase-money and made due return of the execution.—*Stewart v. Stokes*. . . . 494
2. *Informal bonds of public officers*.—Section 132 of the Code, respecting informal bonds under which public officers have acted, applies not only to bonds which are “not in the penalty, payable and conditioned as prescribed by law,” but also to bonds which are in the penalty, payable and conditioned as prescribed by law, but which were not executed, approved and filed within the time prescribed by law.—*Sprowl v. Lawrence*. 674
3. *Delivery and acceptance of bond*.—If the bond of a sheriff is executed and delivered to the approving officer after the expiration of the time prescribed by law, although he may then have no authority to approve or accept it as a statutory bond, it will be upheld as valid, for the benefit of third persons who may be interested in the discharge of the official acts performed under it. 674
4. *Forfeiture of public office*.—The failure of a sheriff to give bond within the time prescribed by law, (Code, § 125,) only renders him liable to a proceeding for the forfeiture of the office, but does not, *per se*, operate his instantaneous removal from it. 674

SLANDER.

1. *When action lies*.—An action does not lie for the speaking of words, which, though actionable in themselves, are shown to have related to a known transaction, not amounting to the charge which the words would otherwise import; but this principle does not extend to cases in which the words, though spoken in reference to a transaction which did not amount to the charge otherwise imported by them, were not known to the hearers to be spoken in reference to that transaction. *Parmer v. Anderson*. 78
2. *Relevancy of words spoken after commencement of suit*.—In an action for verbal slander, the repetition of the slanderous words charged, or the speaking of other words which are of similar import, or which expressly refer to the words charged, after the commencement of the suit, is admissible evidence for the plaintiff, as tending to show malice; *secus*, as to other words spoken after suit brought. 78
3. *Evidence showing sense in which words were understood by hearers*. Where the words charged in the declaration are not, *per se*, actionable, and are not averred to have been intended to impute a slander, or to have been so understood by the hearers, the plaintiff cannot be permitted to prove the sense in which they were understood by the hearers, so as to convert them into a slanderous charge.—*Smith v. Gaffard*. 168
4. *Admissibility of evidence in explanation of admission*.—Plaintiff having proved an admission by defendant of what he had said, in a conversation between his brother and himself,

SLANDER—CONTINUED.

relative to the plaintiff, it is competent for the defendant, in rebuttal of any inference of malice from the words used by him, to prove what he did actually say in the conversation with his brother, and the circumstances under which it was said..... 168

SPECIFIC PERFORMANCE.

See CHANCERY, 24-28.

STATUTES.

1. *Construction of statutes respecting arbitration.*—Statutory provisions in relation to arbitration should be liberally construed by the courts.—*Tuskaloosa Bridge Co. v. Jemison*..... 476
2. *Proviso to statute.*—The natural and appropriate office of a proviso to a statute is to restrain or qualify some preceding matter; and it should always be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter.—*Pearce v. Bank of Mobile*..... 693
3. *General and special statutes.*—A special statute, conferring on a particular bank a summary remedy for the collection of its debts, is not repealed or affected by a subsequent general law, unless the latter act clearly manifests on its face such intention. 693
4. *Repealing statutes.*—It is an established principle, that a subsequent statute shall not repeal a former one by implication, unless the two are so inconsistent that they cannot stand together, 693
5. *General rule of construction.*—A remedial statute must be construed largely and beneficially, so as to suppress the mischief, and advance the remedy; and if the words are not clear and precise, such construction will be adopted as shall appear the most reasonable and the best suited to accomplish the object of the statute, and a construction which would lead to an absurdity will be rejected.—*Sprowl v. Lawrence*..... 674

SURETIES.

1. *Right of subrogation.*—A surety, having paid off the debt, is entitled to stand in the place of the creditor, and to have a mortgage foreclosed, which was given by his co-surety, at whose request he became bound, as well for the security of the debt, as for his indemnity against liability.—*Fawcetts v. Kimmey*... 261
2. *Same.*—A creditor is entitled to the benefit of a mortgage, placed by his debtor in the hands of a surety, for indemnity or security against the debt, and may enforce it for his benefit.—*Troy v. Smith & Shields*..... 469
3. *Same.*—If a surety or endorser pays off a judgment recovered against him, after the return of "no property found" on a judgment previously recovered against his principal, the right of subrogation thereby accruing to him cannot be enforced in an action at law.—*Smith v. Harrison*..... 706
4. *Notice to creditor to sue principal.*—A letter, written by the surety

SURETIES—CONTINUED.

- to the creditor, containing this language, "I am desirous that you should bring suit on M.'s note, on which I am surety, and would prefer that you enter suit in this county, early in August, so that the principal would not have the same time to dodge," is not such notice to sue (Code, § 2647) as will discharge the surety if the creditor fails to sue as requested.—*Savage's Adm'r v. Carleton*..... 443
5. *Competency of surety as witness for principal*.—The surety of an administrator is not a competent witness for his principal, on final settlement of the latter's accounts, (Code, § 2302,) to prove an item of credit.—*Henderson v. Simmons*..... 291

TROVER.

1. *What constitutes conversion*.—To constitute a conversion, such as will sustain an action of trover, there must be a destruction of the plaintiff's property; or some unlawful interference with his use, enjoyment, or dominion over it; or an appropriation of it by the defendant to his own use, in disregard or defiance of the owner's rights; or a withholding of the possession from the owner, under a claim of title inconsistent with his own.—*Conner & Johnson v. Allen & Reynolds*..... 515
2. *When conversion vel non is question for jury*.—When there is evidence tending to show a reasonable excuse for the act or conduct of the defendant, which is relied on by the plaintiff as constituting a conversion, the reasonableness and sufficiency of the excuse is a question for the jury, under proper instructions from the court..... 515

TRUSTS.

1. *When action lies against trustee*.—Where money is deposited in the hands of a trustee or bailee, for the use and benefit of a minor, to be expended by him in defraying the charges of her clothing, schooling and other necessary expenses, under a contract which would authorize the minor, on attaining majority, to maintain an action for money had and received, if a balance had been ascertained against him on settlement, or if he never entered on the discharge of the fiduciary duties devolved on him,—the fact that the trustee, in a former action brought against him by the minor, under appropriate issues, proved all the expenses incurred by him under the contract, and the plaintiff then recovered a judgment on verdict against him, which judgment is unreversed, restores the plaintiff's right of action on the contract, as if the trustee had never entered on the discharge of his duties, or a balance had been ascertained against him on settlement.—*Vincent v. Rogers*..... 224
2. *When action lies by trustee against trust estate*.—The administrator of a deceased administrator cannot maintain an action at law against a succeeding administrator *de bonis non* of the first

TRUSTS—CONTINUED.

- intestate, to recover reimbursement for moneys paid out to an attorney-at-law on account of professional services rendered in and about the business of the administration, or to charge the estate with the payment of such services.—*Cooper's Adm'r's v. Tillman's Adm'r's*: 332
23. *When resulting trust will be established in equity*.—Where the surviving brothers and sisters of a decedent agree, that the money arising from the sale of his lands may be appropriated to the use and support of their father and mother, during the rest of their lives; and one of them, having the money in his possession, invests it in the purchase of a slave, taking the title in his own name, a resulting trust arises, at the election of the other brothers and sisters, in their favor; but when they file a bill to establish and enforce such trust, they must allege that the slave was purchased and paid for with the trust funds. *Danforth v. Herbert*,..... 497
- See, also, LIEN, 8-9.

VENDOR AND PURCHASER.

1. *When vendor may maintain ejectment against purchaser*.—A purchaser of land, holding only his vendor's bond for title, cannot defeat an ejectment by the latter, although the sale was made under a mortgage and the entire purchase-money has been paid; nor does a sub-purchaser from him occupy any better position. *Collins v. Doe d. Robinson*,..... 91
2. *When failure to disclose facts constitutes fraud*.—In the absence of any fiduciary relation between the parties, the purchaser is not bound to disclose to the vendor any material fact within his knowledge, unless he knows or has reason to presume that the latter is ignorant of that fact; nor does his failure to disclose such facts constitute a fraud, against which equity will grant relief.—*Saltonstall v. Gordon*. 149
3. *Same*.—The purchaser is not bound to disclose to his vendor, in buying the latter's title to a tract of land claimed by both under conflicting titles, the fact that he had already sold the land, or the price which he had obtained for it; nor is his failure to disclose those facts fraudulent. 149
4. *When misrepresentation constitutes fraud*.—Where it appears that both parties claimed title to the land; and that the complainant's agent, after having employed an experienced attorney to investigate the facts connected with their conflicting claims, proposed a compromise, which the defendant accepted,—the assertions of the latter, respecting the validity of his title, are the mere expression of an opinion, which could not have misled the complainant, or induced him to enter into the contract, and do not constitute a fraud. 149
- See, also, CHANCERY, 6-9, 23-32.

VERDICT.

See CRIMINAL LAW, 5.

MARRIAGE LICENSES, 3.

WATER COURSES.

1. *What constitutes navigable stream.*—In determining whether a stream is navigable, inquiry should be made as to the following points: whether it is fitted for valuable floatage; whether the public generally, or only a few individuals, are interested in the transportation on it; whether any great public interests are involved in the use of it for transportation; whether its capacity for floatage continues for periods long enough to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and, if so, how long; how it was considered and treated in the government surveys; and whether, if declared public, it will probably be of public use for carriage in future. Tested by these principles, Bashi creek, in Clarke county, Alabama, under the evidence set out in the record in this case, is not a navigable stream.—*Rhodes v. Otis*. 578
2. *Whether stream is navigable, is question of law.*—When the facts are ascertained, it is a question of law for the court whether a stream is a public highway. 578
3. *Burden of proof on question whether stream is navigable.*—All streams below tide-water being, *prima facie*, public, while all above it are, *prima facie*, private, the *onus* of proof is on a party who claims that a stream above tide-water is navigable. 578

WILLS.

1. *Standard of testamentary capacity.*—Although any person, possessing capacity sufficient to transact the ordinary business of life, is capable of making a valid will; yet it cannot be asserted, "that the standard of capacity, fixed by law, as requisite to the making of a will, is such as enables a man to transact the ordinary business of life:" on the contrary, a person may be competent to make a will, without possessing such capacity as would enable him to transact the ordinary business of life. *Stubbs v. Houston*. 555
2. *Same.*—A total deprivation of reason or understanding is not requisite to destroy testamentary capacity. 555
3. *Charges on mental capacity, fraud, and undue influence, approved.* The several charges given by the court in this case, in reference to testamentary capacity, fraud, and undue influence, held correct, on the authority of the following cases: *Coleman v. Robinson*, 17 Ala. 84; *Leverett v. Carlisle*, 19 Ala. 80; *Gilbert v. Gilbert*, 22 Ala. 529; *Taylor v. Kelly*, 31 Ala. 59; *Dunlap v. Robinson*, 28 Ala. 100; *Hughes v. Hughes*, 31 Ala. 520.—*Blakey's Heirs v. Blakey's Executrix*. 611
4. *Burden of proof as to testator's capacity.*—When the probate of

WILLS—CONTINUED.

- a will is contested on the ground of the insanity or mental incapacity of the testator, it is not incumbent on the proponent, in making up the issues, to affirm that the testator was of sound mind; nor is the *onus* on him of proving sanity.—*Stubbs v. Houston* 555
5. *What constitutes undue influence.*—A legal presumption of undue influence does not arise from the facts, that the testator was a man of weak mind, and addicted to drinking; that he was “nigh unto death” when the will was executed; that he was surrounded by the persons who were principally benefitted by the will, while none of his own relations were about him, and that the provisions of the will were unnatural; although the jury may not be prohibited from inferring undue influence from those circumstances.—*Pool’s Heirs v. Pool’s Ex’r*, 145
6. *Relevancy of evidence to prove undue influence or insanity.*—The fact that the testator, several months after the execution of his will, executed a deed conveying all his property to a trustee, to be managed and controlled for him, and that this was done, at the instance of his friends, for the purpose of placing him in an advantageous position to contest the validity of a contract which he had previously made, is relevant evidence for the contestants, as affecting the question of the testator’s mental capacity and susceptibility of influence from others.—*Stubbs v. Houston* 555
7. *Same.*—Whether a will is natural, is a legitimate inquiry, when its validity is contested on the grounds of undue influence and insanity; and, as affecting that question, the pecuniary circumstances of the testator’s nephews, who, in the event of his intestacy, would have been the distributees of his estate, are relevant and pertinent evidence 555
8. *Same.*—The fact that the testator, after the execution of the paper propounded as his will, gave a mortgage to secure a debt not really due, is also competent evidence for the contestants, as bearing on the question of his intellectual condition and capacity 555
9. *Relevancy of evidence affecting question of undue influence.*—Where one of the issues is, whether the will propounded for probate was procured by undue influence; and evidence has been adduced showing that one of the slaves, whom the testator directed to be carried to a non-slaveholding State and there emancipated, making her one of his legatees, had influence over him, and a motive to exercise it in procuring such a will,—it is competent for the proponent to prove who was the reputed father of said slave, and that her reputed father had given the testator, on his removal to this State, fifteen or twenty likely negroes.—*Pool’s Heirs v. Pool’s Ex’r* 145
10. *When witness may give opinion as to testator’s sanity.*—A witness who had known the testator from childhood, and been intimate

WILLS—CONTINUED.

- with him, is competent to give his opinion as to the latter's mental *status* generally, although he seldom saw him during the two or three months which immediately preceded the execution of the will.—*Stubbs v. Houston*..... 555
11. *Parties to contested probate*.—In a contest before the probate court respecting the validity of a will, the proponent is the party plaintiff, and the contestants are the defendants; and the other heirs-at-law, or distributees, though notified of the proceeding, are not parties to it, unless they come forward and make themselves parties.—*Blakey's Heirs v. Blakey's Executrix*, 611
12. *Competency of former proponent as witness for will*.—A person named executor in the will, who has formally renounced the executorship, is a competent witness to sustain the will, although it is shown that he had once propounded the will for probate, but had dismissed his proceeding before the second application was made, and had not paid the costs..... 611
13. *Competency of special administrator as witness for will*.—A special administrator of the estate is a competent witness for the proponent of a will, (Code, § 2302,) although a decree admitting the will to probate would have the effect of placing him in a state of security against some of his official acts..... 611
14. *Admissibility of proponent's declarations as evidence against will*. The declarations of the proponent, he not being the sole legatee, are not competent evidence to defeat the probate of a will, when all the other legatees are neither contesting parties, nor consent to the admission of the declarations..... 611
15. *Implied revocation of will*.—The subsequent execution by the testator of a mortgage on a part of his property, does not operate an implied revocation of his will, (Code, § 1603,) although such mortgage was procured by the sole beneficiary under the will, and was executed by the testator, under the belief that the will was invalid, and with the intention that it should revoke, and be substituted for the will.—*Stubbs v. Houston*..... 555
16. *Probate of will, duly executed and attested, set aside on account of insufficiency of proof as to testator's knowledge of contents*.—Where it appeared that the testator, several months before his death, when his health began to decline, executed a will, by which he bequeathed his entire estate to his mother, who was his sole heir-at-law and next of kin; that on the day before his death, being then very feeble and greatly prostrated by sickness, he executed another will, by which he gave a legacy to his uncle, the proponent, who was also his attending physician and guardian, and who had never made a settlement of his guardianship; that no person was present when the latter will was prepared, except the proponent and the attorney by whom it was written, the attorney having been sent for by the proponent; and that the testator had not been heard to express any dissatisfaction with the former will,—*held*, that the probate of the latter will was

WILLS—CONTINUED.

- properly set aside, because it was not affirmatively shown that the will embodied instructions given by the testator, or that he was made acquainted with its contents when he signed it. *McCartney's Ex'rs v. Bone and Wife*..... 601
17. *Construction of will as to reversionary interest after widow's death.*
 • Where a testator directed "the remainder" of his estate, after payment of debts, to be equally divided among his wife and children; bequeathing the interest of the widow to her during her life or widowhood; authorizing his executors, by a codicil, to sell any of the real estate which they might deem advisable, and directing them to divide the proceeds of sale according to the main body of the will,—*held*, that the testator died intestate as to the reversionary interest in that part of the real estate which was allotted to the widow during life or widowhood, and that the executors had no authority to sell it after her death. *Johnson's Adm'r v. Johnson*..... 284

WITNESS.

1. *Competency of defendant as witness for co-defendant.*—Under section 2288 of the Code, a defendant against whom there is no evidence is a competent witness for a co-defendant.—*Rabby & Co. v. O'Grady*..... 255
2. *Competency of assignor as witness for assignee.*—When the assignee of a promissory note is the defendant in an action, and seeks to establish it as a set-off, he may render his assignor a competent witness for him, to prove the time when the assignment was made, by releasing him from all liability on account of the note: section 2290 of the Code does not apply to such a case.—*Grayson v. Glover*..... 182
3. *Competency of person of mixed blood as witness.*—A person whose great-grandmother was the daughter of a mulatto, by a negress, is not a competent witness against a white person, (Code, § 2276,) although his father, maternal grandfather and great-grandfather were white men.—*Dupree v. The State*..... 380
4. *Competency of former proponent as witness for will.*—A person named executor in the will, who has formally renounced his executorship, is a competent witness to sustain the will, although it is shown that he had once propounded the will for probate, but had dismissed his proceeding before the second application was made, and had not paid the costs.—*Blakey's Heirs v. Blakey's Executrix*..... 611
5. *Competency of special administrator as witness for will.*—A special administrator of the estate is a competent witness for the proponent of a will, (Code, § 2302,) although a decree admitting the will to probate would have the effect of placing him in a state of security against some of his official acts..... 611
6. *Competency of surety as witness for principal.*—The surety of an administrator is not a competent witness for his principal, on

WITNESS—CONTINUED.

- final settlement of the latter's accounts, (Code, § 2302,) to prove an item of credit.—*Henderson v. Simmons*..... 291
7. *Competency of agent as witness for principal*.—In an action on a note given for the hire of a slave, by an assignee against the maker; the defense being that the owner agreed to sell the slave to the defendant at the expiration of the term, for a stipulated sum including the hire, but afterwards failed and refused to comply with said agreement; an agent, whom the defendant employed to procure the slave for him, and who took a bill of sale in his own name, is a competent witness for the plaintiff, although an action of detinue is pending against him, at the suit of the defendant, for the recovery of the slave.—*Nesbitt v. Pearson's Adm'rs*..... 668
8. *Competency of witness to testify to character*.—A person who is acquainted with the prisoner's character, and who has known him for eight or ten years, is competent to testify to his character, although he may have resided more than twenty miles distant from the prisoner's residence.—*Dupree v. The State*... 380
9. *Cross examination of witness*.—A witness may be asked, on cross examination, "if he was not then under the influence of ardent spirits."—*Pool's Heirs v. Pool's Ex'r*.... 145
10. *Mode of impeaching witness*.—The testimony of a witness on immaterial points cannot be contradicted for the purpose of impeaching him.—*Blakey's Heirs v. Blakey's Executrix*..... 611
11. *Same*.—A witness cannot be interrogated about an immaterial matter for the purpose of laying a predicate to impeach or contradict him.—*Rosenbaum v. The State*..... 354
12. *When witness may testify to ignorance of fact*.—Where the situation of a witness was such that, if a certain fact had existed, he would probably have known it, his want of knowledge is some evidence (though slight) that it did not exist; and he will be allowed to testify, in such case, that if the fact existed, he did not know it.—*Blakey's Heirs v. Blakey's Executrix*..... 611





UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 167 772 1

